United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

952

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,599

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES T. SKEENS, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
CHARLES R. WORK,
BROUGHTON M. EARNEST,
Assistant United States Attorneys.

Cr. No. 996-67

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

III

ISSUES PRESENTED *

In the opinion of appellant, the following issues are presented:

1. Whether the longstanding privilege which protects the identity of a Government informant can be circumvented by a mere speculative assertion of "necessity"?

2. Whether the trial court's determination that disclosure of the Government's informant was necessary, on the basis of mere speculation as to his usefulness to the defense, constitutes an abuse of discretion?

---

* This case has been before this Court in *United States* v. *Green*, 134 U.S. App. D.C. 278, 414 F.2d 1174 (1969).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,599

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES T. SKEENS, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLANT

REFERENCES TO RULINGS

Trial court's oral ruling of August 1, 1969 (Tr. August 1, 1969, pp. 1-29). Trial court's order of August 7, 1969 setting aside the verdict and dismissing the indictment (App. 21).

STATEMENT OF THE CASE

Appellee was indicted on August 10, 1967, along with a co-defendant, Francis Reichert, on one count of robbery (22 D.C. Code § 2901) and two counts of assault with a dangerous weapon (22 D.C. Code § 502).[1] The charges

[1] *See* Indictment filed August 10, 1967 (App. 3).

stemmed from the armed robbery of an employee of Duke Zeibert's Restaurant, in which two bandits netted approximately $14,000 in cash and checks which was being conveyed to a nearby bank.

After Reichert's case was severed, appellee came to trial on February 17, 1969. A trial by jury, with the Honorable June L. Green presiding, followed, during the course of which the Government resorted to this Court on two occasions seeking a writ of mandamus or prohibition and a third time seeking a stay of the proceedings.[2] On February 26, the jury returned a verdict of guilty as to the robbery count and one count of assault with a dangerous weapon and not guilty as to the other count of assault with a dangerous weapon. On oral motion of counsel for appellee for judgment n.o.v. or for dismissal the trial court set aside the guilty verdict and *sua sponte* ordered a new trial on February 28.[3] This Court then ruled that the trial court's order of February 28 setting aside the verdict and ordering a new trial was a nullity, leaving the case in the posture of a jury verdict having been returned with post-verdict motions still pending.[4] Upon the renewed motion of appellee for a judgment of acquittal n.o.v. or in the alternative for a new trial (App. 8), the trial court by order of August 7, 1969 (App. 21), again set aside the jury verdict and dismissed the indictment. From this order the present appeal is now taken.[5]

The Trial

At trial the Government put on the victim of the robbery, Nathaniel Swindler, who testified that at about 10:30 a.m. on May 15, 1967, he was robbed by two men

---

[2] *See* Orders in *United States* v. *Green*, No. 22,787, dated February 24, 1969, March 3, 1969, and June 27, 1969 *infra* nn. 8, 9.

[3] *See* Order of February 28, 1969 (App. 6).

[4] See *United States* v. *Green*, 134 U.S. App. D.C. 278, 414 F.2d 1174 (1969).

[5] Jurisdiction is founded upon 18 U.S.C. § 3731 and 23 D.C. Code § 105(a).

in an alley behind Duke Zeibert's Restaurant at 1722 L Street, N.W. (Tr. 202-205). Swindler made an in-court identification of appellee as one of the two robbers and stated that appellee was carrying a pistol at the time of the robbery and that the other man was carrying a sawed-off shotgun (Tr. 204-205). After the robbery Swindler gave a detailed description of both bandits to the police (Tr. 206-207, 212-213). Swindler then related the circumstances of a photographic identification made at police headquarters on the same day as the robbery in which he had picked out two photographs of appellant from some 175 to 200 slides he was shown (Tr. 207-209). The Government also called Ruth Bugg, the office manager and bookkeeper at Duke Zeibert's Restaurant, who confirmed that Swindler had about $14,000 in cash and checks to be delivered to the bank at the time he was robbed (Tr. 127-136). After presenting these two witnesses the Government rested its case (Tr. 275).

Before proceeding with the defense case, counsel for appellee requested that a hearing be held out of the presence of the jury to ascertain what possible *Brady*[6] material favorable to the defense might be in the possession of Sergeant Louis Blancato of the Metropolitan Police, who was one of the investigating officers (Tr. 282). At the hearing it developed that about three weeks after appellee's arrest the police had been contacted by an informant (Tr. A, p. 3).[7] This informant was considered "very reliable" by Sergeant Blancato (Tr. 311), who had spoken to him before about other cases (Tr. A, p. 3). The informant had related the following information to Blancato:

1. Appellee and one John Scott had hired a man named Red Pope, a parolee, to kill the Government's witness, Swindler (Tr. 286, 308).

---

[6] *Brady* v. *Maryland*, 373 U.S. 83 (1963).

[7] This reference is to a short eleven page transcript of proceedings covering the afternoon of February 19, 1969, and all such references will be indicated by (Tr. A.)

2. The shotgun used in the robbery had been stolen from a house in Prince George's County, Maryland (Tr. 286).

3. Francis Reichert (appellee's co-defendant) was the man who had carried the shotgun during the robbery (Tr. 316-317).

4. The shotgun was then at 1030 13th Street, Northwest, where Reichert's girl friend, Kay Travett McCurry, lived (Tr. 308, 312, 314, 316).

5. The house on 13th Street was actually the residence of one John Travett, and Reichert's girl friend, Kay Travett McCurry, was also living with John Travett (Tr. 314). Apparently this woman lived with Reichert while Travett was in jail (Tr. 311).

Acting upon this information Blancato and other police officers went to the address on 13th Street and talked to Kay Travett McCurry. They also made a search of the premises for the shotgun. Although the shotgun did not turn up, a shotgun shell was seized. (Tr. 308). The officers then went looking for Red Pope and arrested him in a restaurant on 14th Street (Tr. 308). Pope was held as a parole violator but never charged with the conspiracy to kill, because the police could not afford to disclose their informant, and they had no other evidence with which to back up what the informant had revealed (Tr. 308). Pope did admit knowing appellee, Reichert and John Scott when questioned by police, but never admitted being hired to kill Swindler (Tr. 309). Two days after the police arrested Red Pope, Blancato received a second call from the informer who stated that another person by the name of Lewis had been hired to kill Swindler (Tr. 312-313).

Upon learning of the existence of this informant appellee's counsel asked for his name, but Blancato refused to disclose it (Tr. 287) on the ground that the informant might be killed (Tr. 313). After lengthy argument as to the necessity of disclosing the identity of the informant (Tr. 291-321), the trial court indicated that the defense had a right to cross-examine the informant (Tr.

321). A luncheon recess followed during which Blancato contacted the informant by telephone. During a subsequent *in camera* proceeding Blancato revealed the additional information, supplied to him by the informant, that the shotgun used in the robbery had been stolen by Reichert from John Scott's Coffee Shop on Birch Avenue and that it had originally been stolen from a home in the Cheverly area of Maryland in 1966 (Tr. A, p. 2). When Blancato asked the informant if he would come in to meet with the trial judge, he became very frightened and, fearing for his life, refused to meet with the judge at any time or place (Tr. A, pp. 2, 7).

In spite of the apprehensions of the informant, the trial court, nevertheless, indicated it would require the informant to be revealed or the court would dismiss the case (Tr. 2, p. 6). The court's final decision, however, was reserved until the following day in order for the prosecuting officials to determine their course of action. (Tr. A, pp. 9-11).

On the following day, February 20, the Government asked for a stay in order to seek a writ of mandamus or prohibition in this Court precluding the trial court from dismissing the case (Tr. 352). At the request of appellee, however, the trial court decided to allow the trial to proceed with the understanding that if the Government's petition for mandamus was denied, the indictment would be dismissed (Tr. 368-369). The defense then called several witnesses in an attempt to establish an alibi defense. The testimony of Howard Wood, a parole officer, placed appellee at 300 Indiana Avenue, N.W. at 11:00 a.m. on the day of the robbery (Tr. 552, 553). Paul Sherbacow, appellee's former defense attorney, placed appellee at his office at 601 Indiana Avenue, N.W., between 11:10 and 11:20 a.m. on the day of the robbery (Tr. 410-411). Appellee declined to testify despite the prosecutor's assurance that he would not use a prior felony conviction for impeachment (Tr. 3-4). The defense then rested its case on February 24, subject to a ruling on the Government's petition for mandamus

(Tr. 572-573). A motion for a judgment of acquittal was made and denied (Tr. 573-585).

The Government then proffered Red Pope to the defense, having finally located and subpoened him (Tr. 587-588). Pope was examined by defense counsel but apart from giving his name and address refused to answer any questions, relying on his Fifth Amendment privilege (Tr. 588-593). The Government having already established that the robbery had occurred at 10:30 a.m. on the day in question (Tr. 202-205), and the defense having placed appellee at 300 Indiana Avenue with his parole officer at 11:00 a.m., the Government then put on rebuttal testimony by way of a stipulation that the driving time at 10:30 a.m. between the scene of the crime and 300 Indiana Avenue was approximately nine to ten minutes (Tr. 593-594). After final arguments by both prosecution and the defense, this Court acted upon the Government's petition for mandamus and ordered the trial court to allow the case to be submitted to the jury.[8]

On February 25 the trial court instructed the jury (Tr. 686-705), and on February 26 the jury returned a guilty verdict as to the robbery count and one count of assault with a dangerous weapon, acquitting appellee on the remaining count. The defense immediately asked for

---

[8] *See* Order of February 24, 1969, Judges Burger and Wright sitting:

> "This matter came on for consideration on a petition filed by the United States of America for the issuance of a writ in the nature of mandamus or prohibition. The petition alleges that the District Court has announced that unless the United States discloses the identity of an informant as sought by the defendant, the District Court will dismiss the indictment; and it appearing that the pending case has reached the point of final arguments to the jury; it is
>
> ORDERED by the Court in aid of preserving the jurisdiction of this Court (see Title 28 U.S. Code § 1651) the District Court is directed to allow the trial to take its ordinary course including submission of the case to the jury without prejudice to, such action following verdict or judgment as may be deemed appropriate in the circumstances at that time, all action of this Court and the District Court being without prejudice to the rights of the parties herein."

a judgment n.o.v. on the ground that the informant had not been produced. The trial court at first was inclined to grant the motion but gave the Government until February 28 to prepare an argument. (Tr. of February 26, 1969, pp. 8-9).

On February 28 the Government filed a supplemental petition for a writ of mandamus or prohibition in this Court to require the trial court to enter judgment against appellee and sentence him. The trial court was then requested to continue the proceedings until this Court could rule on the supplemental petition. The trial court denied this motion, whereupon the Government requested that the trial court hear argument but defer ruling until this Court could rule. This motion was also denied. (Tr. of February 28, 1969, pp. 1-3. While argument was progressing the Government filed in this Court a motion for immediate stay of proceedings and served a copy on the court. The motion for stay was granted.[9]

Although the order of this Court had been entered, and in contemplation of law the proceedings were stayed, the District Judge proceeded as if she had authority to rule in the case. The defense moved for a judgment of acquittal n.o.v. or in the alternative for dismissal of the indictment, on the ground that the informant had not been produced (Tr. of February 29, 1969, p. 7). The trial court chose, however, to set aside the verdict and *sua sponte* ordered a new trial conditioned on the production of the information.[10] (Tr. of February 28, 1969, p. 36).

---

[9] *See* Order of February 28, 1969, Judges Burger and Leventhal sitting:

> "On consideration of petitioner's motion for immediate stay of the proceedings presently being conducted before District Judge Green on the defendant's motion for a judgment of acquittal, N.O.V., in criminal number 996-67, it is
>
> ORDERED by the Court that the aforesaid proceedings be stayed, pending further order in order to preserve the jurisdiction of this Court."

[10] *See* Order of February 28, 1969 (App. 6).

This Court then declared the trial judge's action in setting aside the verdict and ordering a new trial a nullity, but declined to order the trial judge to take any specific action. Rather, this Court's ruling left the case in the posture of a jury verdict having been returned with post-verdict motions still pending.[11] Subsequently, the defense filed a written motion for a judgment of acquittal n.o.v., or in the alternative for a new trial (App. 8), and the Government filed its opposition (App. 10). Finally, on August 1, 1969, the trial court held a hearing on the pending motions and indicated that it once again intended to set aside the verdict. The proceedings culminated in the trial court's order of August 7, 1969 (App. 21), setting aside the verdict and dismissing the indictment. It is from this dismissal that the present appeal is taken.

ARGUMENT

I. A heavy burden rests upon the defense to demonstrate why there should be an exception to the longstanding privilege which protects the identity of a Government informant.

The Supreme Court has long recognized the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. *Scher* v. *United States*, 305 U.S. 251 (1939). *In re Quarles and Butler*, 158 U.S. 532 (1895); *Vogel* v. *Gruaz*, 110 U.S. 311 (1884). Professor Wigmore has endorsed the privilege in the following words:

> A genuine privilege, on . . . fundamental principle . . . must be recognized for the identity of persons supplying the government with information concerning the commission of crimes. Communication of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed.

---

[11] *United States* v. *Green*, *supra* note 4.

> Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity—to protect himself and his family from harm, to preclude adverse social reactions and to avoid the risk of defamation or malicious prosecution actions against him. The government also has an interest in nondisclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship.
>
> That the government has this privilege is well established, and its soundness cannot be questioned. 8 Wigmore Evidence § 2374 (McNaughton rev. 1961).

Not only is this privilege a longstanding one, but it has proved a vital tool in combating the present day sophisticated and growing criminal element.[12] It is against this background, however, that exceptions to the general rule have arisen which occasionally require disclosure of an informant's identity. *Bona fide* requests for disclosure may arise in two different contexts: either in a hearing on probable cause for an arrest or search, or in the actual determination of guilt or innocence at trial.[13] It is the latter situation with which we are now concerned.

In the federal courts the rules of evidence in criminal trials, including the privileges of witnesses, are governed "by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience." [14] The Supreme Court in

---

[12] *The Challenge of Crime In A Free Society: A Report By The President's Commission of Law Enforcement and Administration of Justice,* 218 (1967).

[13] Compare *Roviaro* v. *United States,* 353 U.S. 53 (1957), with *McCray* v. *Illinois,* 386 U.S. 300 (1967).

[14] Rule 26, Fed. R. Crim. P.

Roviaro v. *United States*, *supra* note 13, set about the task of defining the scope of the Government's privilege pursuant to its supervisory jurisdiction. In *Roviaro* the defendant had been brought to trial on charges of possession and sale of narcotics. The prosecution introduced evidence of a conversation between the informant and the defendant which occurred at the time of the alleged sale and then refused to disclose the identity of the informer. It developed that the informer was the sole participant in the alleged transaction other than the defendant and had prearranged with police to buy narcotics from the defendant. The Court expressly relied upon these factors in reversing:

> [T]he Government's use against petitioner of his conversation with John Doe . . . emphasized the unfairness of the nondisclosure in this case. . . .
>
> This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. . . . 353 U.S. at 64.

The Court then laid down guidelines for the federal courts to follow when faced with a request for disclosure at trial:

> Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.
>
> . . . .
>
> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend *on the particular circumstances of each case, taking into consideration the crime charged, the possible de-*

> *fenses, the possible significance of the informer's testimony, and other relevant factors.* 353 U.S. at 60-62 (Emphasis added.)

The Supreme Court again considered the disclosure problem in *Rugendorf* v. *United States*, 376 U.S. 528 (1964). The Court there affirmed a conviction in spite of nondisclosure of an informant's identity. The Court relied on the defendant's failure to make a timely request for disclosure but distinguished *Roviaro* by pointing out that in *Rugendorf* there was no intimation that the informant "had played a direct and prominent part, as the sole participant with the accused, in the very offense for which the latter was convicted." 376 U.S. at 534. In fact it was unclear in *Rugendorf* whether the informant had participated at all in the alleged crime. The *Rugendorf* opinion quoted the above italicized language from *Roviaro* and emphasized that the defendant in *Rugendorf* had not developed the essential criteria:

> Having failed to develop the criteria of *Roviaro* necessitating disclosure on the merits, we cannot say on this record that the name of the informant was necessary to his defense. 376 U.S. at 535.

Thus *Rugendorf* by implication rules out the disclosure of an informant on the basis of mere speculation as to his usefulness and demonstrates the heavy burden which rests upon the defense to make an affirmative showing of necessity for disclosure by meeting the criteria for the exception laid out in *Roviaro*. Other than its initial opinion in *Roviaro* and its subsequent language in *Rugendorf*, the Supreme Court has not attempted to formulate a more specific test for requiring disclosure of an informant at trial.[15]

---

[15] *Cf. McCray, supra* note 13, where the Court merely reaffirmed *Roviaro*.

II. Disclosure of a Government informant must be predicated upon an affirmative showing of necessity based upon established criteria.

In its pursuit of fundamental fairness the Supreme Court in *Roviaro* required disclosure of an informant whenever it would be relevant or helpful to the defense. It is clear, however, that the Court did not mean that disclosure should be required whenever a defendant merely *asserts* it would be relevant or helpful; rather, it envisioned a balancing process between the interests of the defendant and those of society. To allow disclosure on the basis of mere speculation would be to do away with the Government's privilege altogether, and accordingly society's interests would never be served. In *dicta* the *Rugendorf* Court recognized the burden upon the defense to bring itself within the exception to the informer privilege.

The circuit courts of appeal have accordingly required a strong affirmative showing that disclosure is necessary to the defense when sought on the grounds it would be relevant or helpful. Relying on factors expressly enumerated in *Roviaro*, the courts have uniformly focused on several criteria in striking a balance of interests. The most crucial of these has been the participation or nonparticipation by the informant in the actual commission of the alleged offense.

Virtually every federal appellate court, including this one in *Anderson* v. *United States*, 106 U.S. App. D.C. 340, 273 F.2d 75, *cert. denied*, 361 U.S. 844 (1959), has had occasion to pass on the nondisclosure of an informant where the record revealed that he was not an actual participant or witness to the offense. The courts have consistently held that *Roviaro* did not require disclosure under these circumstances.[16] Conversely, those cases

---

[16] See *Zaroogian* v. *United States*, 367 F.2d 959 (1st Cir. 1966); *Marderosian* v. *United States*, 337 F.2d 759 (1st Cir.), *cert. denied*, 389 U.S. 971 (1964); *United States* v. *Roberts*, 388 F.2d 646 (2d Cir. 1968); *United States* v. *Russ*, 362 F.2d 843 (2d Cir. 1966), *cert. denied*, 385 U.S. 923 (1966); *United States* v. *Konigsberg*, 336

which have found reversible error because of nondisclosure have done so on the specific ground that the informant was an actual participant in the criminal transaction. *Lopez-Hernandez* v. *United States*, 394 F.2d 820 (9th Cir. 1968); *Gilmore* v. *United States*, 256 F.2d 565 (5th Cir. 1958).

In *Anderson* the defendant was arrested on narcotics charges during the execution of a search warrant which had been obtained partly as a result of information received from an informant. The defendant did not challenge the search but said that the name of the informant would have been helpful to him in preparing his defense. This Court, however, pointed out that the informant was not a participant in the offense and using the language of *Roviaro*, ruled that "[i]n these circumstances, revealing his identity was neither essential, relevant nor helpful in the preparation of Anderson's defense." 106 U.S. App. D.C. at 341, 273 F.2d at 76.

Because the defense of entrapment was in issue in *Roviaro*, several courts in affirming nondisclosure have emphasized that there was no entrapment issue involved in the case along with non-participation by the informer. *United States* v. *Simonetti*, 326 F.2d 614 (2d Cir. 1964); *Mosco* v. *United States*, 301 F.2d 180, 189 (9th Cir. 1962).[17] Other courts, taking a key from *Roviaro*, have in addition looked to whether or not testimony concerning what the informer told the police was introduced by the Government in its case in chief. *Rocha* v.

F.2d 844 (3d Cir. 1964), *cert. denied*, 379 U.S. 930 (1964); *United States* v. *Pitt*, 382 F.2d 322 (4th Cir. 1967); *Rocha* v. *United States*, 401 F.2d 529, (5th Cir.); *cert. denied*, 393 U.S. 1103 (1969); *Bruner* v. *United States*, 293 F.2d 621 (5th Cir.), *cert. denied*, 368 U.S. 947 (1961); *Pegram* v. *United States*, 267 F.2d 781 (6th Cir. 1959); *Churder* v. *United States*, 387 F.2d 825 (8th Cir. 1968); *Rodriguez-Gonzalez* v. *United States*, 378 F.2d 256 (9th Cir. 1967); *Garibay-Garcia* v. *United States*, 362 F.2d 509 (9th Cir. 1966), *Cook* v. *United States*, 354 F.2d 529 (9th Cir. 1965); *Garcia* v. *United States*, 373 F.2d 806 (10th Cir. 1967).

[17] *Cf. Miller* v. *United States*, 273 F.2d 279 (5th Cir.), *cert. denied*, 362 U.S. 928 (1960); *United States* v. *Collier*, 313 F.2d 157 (7th Cir. 1963).

United States, 401 F.2d 529 (5th Cir.), *cert. denied*, (1969); *Mosco*, *supra*; *Bruner* v. *United States*, 293 F.2d 621 (5th Cir.), *cert. denied*, 368 U.S. 947 (1961). In spite of the fact that the Government did make use of the informant's statements in its case in chief, all of these cases affirmed nondisclosure on the ground that the informant had not actually participated in the alleged offense.[18]

Thus, the general balancing test first recommended in *Roviaro* has evolved into a rather specific inquiry, and the single most important criterion is the participation or lack thereof on the part of the informant in the commission of the crime involved. Any disclosure decision which fails to take these established principles into consideration, as in the instant case, is not in keeping with the import of *Roviaro* or the dictates of Rule 26, Fed. R. Crim. P.,[19] and accordingly cannot stand.

III. Since appellee's only grounds for requiring disclosure of the Government's informant were purely speculative, the trial court's dismissal (based upon the Government's nondisclosure) was an abuse of discretion.

(Tr. 203-205, 292, 301-303, 406; Tr. A. pp. 2-3).

An examination of the record in the instant case discloses no legitimate basis whatsoever for the trial court's conclusion that the appellee was entitled to learn the identity of the Government's informant. On the contrary the record clearly reveals that this is exactly the type

---

[18] See *Miller*, *supra* n.17; where the court in affirming a nondisclosure expressly took note of the fact that the informant had not been mentioned in the Government's case in chief, but his existence had been brought out by the defense on cross-examination. *Cf. United States* v. *Head*, 353 F.2d 566, 569 (6th Cir. 1965), where the court pointed out the fact that the prosecutor had not relied on the informer or his information in establishing the commission of the offense by the defendant.

[19] "The admissibility of evidence and the competency and privileges of witnesses shall be governed . . . by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

of situation in which the informant should *not* be disclosed. Appellee failed to shoulder the burden of showing the necessity of disclosure by any standards. When pressed as to how the informant's identity would be relevant or helpful to his defense appellee could only respond vaguely that disclosure was necessary "to get to the core of the matter" (Tr. 292) or to "find out what really happened" (Tr. 301).

A close analysis of what the informer communicated to the police demonstrates not only that the information was of little use to the police, but also that disclosure of the informant's identity would have been of little value to the defense. In the first place, the informer did not even contact the police until three weeks after appellee had been arrested (Tr. A, p. 3), so the information had nothing to do with the probable cause for appellee's arrest. The informant's revelations were of so little importance to the prosecution that it did not introduce evidence that an informer even existed much less what he had said. The only mention of the informant before the jury was made as a tactical move by the defense in examining Detective Sergeant Blancato (Tr. 406). The reason the prosecution did not introduce evidence of the informant's revelations is simply that they were not very relevant and shed no light on the issue before the court and jury.

Certainly appellee made no showing of, nor does the record reveal, any of the established criteria which augur for disclosure. On the most crucial point, that of participation, it is virtually certain that the informant did not participate in any way in the commission of the offense, nor does it seem possible that he was even a witness to the eevnt. The robbery took place in broad daylight in an alley, and only two robbers were involved. (Tr. 203-205) Swindler identified appellee and Reichert as the two robbers. There was no indication that anyone else was present in the alley. Because of these circumstances it is apparent that the informant's information was obtained by hearsay and not as a result of having been present at the scene of the robbery.

The exact information which the informant related to police has been more carefully set out earlier, *supra* pp. 3-5. In summary, the informant told police that he knew the source of the shotgun; that appellee and Reichert had hired Red Pope to kill Swindler; that Reichert had carried the shotgun during the robbery; and that the shotgun might be found at Reichert's girl friend's house on 13th Street, N.W. Appellee was primarily interested in the fact that this informant knew the "source of the shotgun" (Tr. 301-303). Blancato, however, clarified what was meant by the "source of the shotgun" and provided the additional information from the informant that the shotgun used in the robbery had originally been stolen from a house in Prince George's County, Maryland, and that it had in turn thereafter been stolen by Reichert from John Scott's Coffee Shop on Birch Avenue (Tr. A, p. 2).

It is readily apparent that the informant's knowledge of the source of the shotgun used by Reichert during the robbery could shed no light on whether or not appellee had participated in the robbery. Yet counsel for appelle argued that because of the existence of an alibi defense and because of what he characterized as a "poor" identification, it was necessary to have testimony about the source of the shotgun (Tr. 301-303). The logic of such an argument is elusive. How could testimony from an informant about the source of the shotgun which Reichert carried have any bearing on the identification of appellee?

It seems clear that under these circumstances appellee could only speculate about the relevancy or helpfulness of any testimony which the informant's disclosure might lend to his defense. Except for this nebulous argument about the necessity for testimony on the source of the shotgun, appellee never proffered how the informant's testimony would have been helpful, relevant or necessary to his defense. In fact, when asked for such a proffer by the Government, counsel for appellee scoffed: "The Government asks us to proffer what we can show by him. How ridiculous." (Tr. February 28, 1969, p. 33).

Ridiculous as it may have seemed to appellee, the courts have nevertheless required such a showing before allowing disclosure. Mere speculation is not sufficient to meet the defense's burden. As the court observed in *Lannom* v. *United States*, 381 F.2d 858 (9th Cir. 1967),[20] "Mere speculation that the informer might possibly be of some assistance is not sufficient to overcome the public interest in the protection of the informer." 381 F.2d at 861. The reason for this policy is readily apparent:

> If the informer's relation to the acts leading directly to or constituting the crime may be assumed from a fertile imagination of counsel, the Government in practically every case would have to prove affirmatively that the informant had not done any such likely acts. Having done that, all would be revealed and the informer privilege, deemed essential for the public interest, for all practical purposes would be no more. *Miller* v. *United States, supra*, 273 F.2d at 281.

To allow speculation on these crucial matters would be to abandon the balancing test of *Roviaro* and thereby to abandon society's interests which hang in the balance. No attempt was made to relate the possible significance of the informant's testimony to the offense charged or to the possible defenses. In effect appellee's position was that he could not tell what the import of the informer's testimony would be until he was disclosed. This is exactly the type of situation in which disclosure should be forbidden. To allow disclose in such circumstances would entitle every defendant to demand revelation of an informant's identity regardless of the potential use of his testimony, in the hope that the Government would abandon its case rather than risk the life of a valuable in-

---

[20] *Cf. Jimenez* v. *United States*, 397 F.2d 271 (5th Cir. 1968); *Ruiz* v. *United States*, 380 F.2d 17 (9th Cir.), *cert. denied*, 389 U.S. 993 (1967); *Rodriguez-Gonzalez* v. *United States, supra* note 16; *Miller* v. *Sigler*, 353 F.2d 424 (9th Cir. 1965); *United States* v. *Hanna*, 341 F.2d 906 (6th Cir. 1965).

formant or cut off an important flow of information. We respectfully submit that such was not the intent of the Supreme Court in *Roviaro* and that such a distortion of the standard enunciated therein would have disastrous effects on a long standing and vital interest of society.[21]

CONCLUSION

WHEREFORE, appellant respectfully submits that the order setting aside the jury's verdict and dismissing the indictment be set aside, and that this case be remanded to the District Court with instructions that the verdict be reinstated and that appellee be sentenced.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
CHARLES R. WORK,
BROUGHTON M. EARNEST,
Assistant United States Attorneys.

---

[21] The trial court's action in requiring disclosure in the instant case may in some degree be attributed to its misunderstanding of the relevant testimony. After listening to Blancato's account of the informant's revelations, the trial court indicated its confusion about what had been revealed (Tr. 304). Even though it was clear from the informant's information that Reichert had held the shotgun during the robbery (Tr. 316-317), the trial court apparently misconstrued this testimony and believed that the informant had indicated Red Pope had held the shotgun during the robbery (Tr. 321, Tr. February 19, 1969, p. 10). The source of this confusion was probably Blancato's testimony to the effect that Kay Travett McCurry, not the informant, had seen Reichert and Red Pope together with a shotgun at another time and place unrelated to the robbery in the instant case (Tr. 314-315). Whether or not the trial court's action was precipitated by a misunderstanding of the facts or a misapplication of the law, we maintain that in either event the court's ruling was error.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 407307 275

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,599

UNITED STATES OF AMERICA,

Appellant,

v.

JAMES T. SKEENS,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

Allan M. Palmer
1707 N Street, N.W.
Washington, D.C. 20036
Attorney for Appellee

Washington, D. C. - THIEL PRESS - 202 - 393-0625

INDEX

TABLE OF CASES

---

*Cases chiefly relied upon are marked by asterisks.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,599

UNITED STATES OF AMERICA,

Appellant,

v.

JAMES T. SKEENS,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

ISSUE PRESENTED

In the opinion of Appellee the following issue is presented: Where the record abundantly disclosed a defense need for informer production to adequately defend against the changes, was the Trial Court in clear error when it dismissed the indictment herein, after the Government refused informer production when ordered to do

so, when the Supreme Court has previously indicated that such dismissal was an appropriate remedy?

COUNTERSTATEMENT OF THE CASE[1]

In the opening round of this criminal case, government counsel stated to the jury that he would produce three witnesses in support of the indictment. Mrs. Bugg would testify that as office manager for Duke Zeibert's Restaurant, she gave bank deposits to Nathaniel Swindler at about 10:30 a.m. on May 15, 1967. Mr. Swindler would testify that he received the money, went out the back door of the restaurant and was held up by two men one of whom was allegedly James T. Skeens. The third projected witness was Detective McCathran who responded to the restaurant and interviewed Mr. Swindler, getting a description of the robbers. Mr. Swindler upon being shown many photographs, picked out Skeens' picture. A warrant was obtained for Skeens, and on the evening of the robbery the latter was arrested at his home. McCathran would also testify—said the prosecutor—that they also found in Skeens' home a man who answered the description of the second hold-up man. "Detective McCathran will also testify that they found in the home of Defendant James Skeens a large sum of money." (Tr. 124-126).

Ruth Bugg testified essentially as outlined. She stated that a deposit slip for about $14,000 was given to Swindler with $5,999 in cash and the rest in checks. The breakdown of the funds had

[1] As noted by the government at page 2 of its brief, this case has previously been before the Court on the government's mandamus petition. *United States v. Green,* 134 U.S. App. D.C. 278, 414 F.2d 1174 (1969). Although the Court did not then reach the informer issue on procedural grounds, Judge Leventhal did observe at oral argument that a requirement for informer production might very well vary inversely, to the strength of the government's case. With this in mind—in addition to the obvious logic of fully portraying the trial atmosphere in which Judge Green Ruled—we have undertaken an extensive factual outline of what transpired

been noted on a piece of paper at the time by Mrs. Bugg, which was moved into evidence as Defendant's Exhibit No. 1. On the day of the robbery Mrs. Bugg informed Detective Sergeant Blancato that about $6,000 in cash had been stolen plus various checks.

CROSS-EXAMINATION

Q. So the $6,000 cash figure actually dropped to $5,997.48?

A. Right.

Q. And it never dropped below that point, did it?

A. No. (Tr. 137)

Nathaniel Swindler testified that on the morning in question he received the bag from Mrs. Bugg, went out the back delivery entrance of the restaurant and started through the alley to the bank. He was confronted by two men in the alley, one of whom carried a pistol and told him to drop the bag, "this is a holdup" (Tr. 204) The second, taller man, standing off to the side also told him to "drop it", brandishing what appeared to be a sawed-off shotgun. After Swindler did as he was instructed, the shorter man picked up the bag and both hold-up men left the alley via an adjoining building. Swindler then returned to Duke Zeibert's and reported the robbery at about 10:40 a.m. (Tr. 214)

Mrs. Bugg had earlier testified that upon his return, Mr. Swindler appeared "very nervous."

"Q. Describe to the members of the jury, if you will.

A. He leaned up against my door and kind of sagged down. He was quite upset.

Q. Was he at all nervous or upset in how he related this incident to you?

A. Yes." (Tr. 137)

---

below as an addition to the rather sketchy "Statement of the Case" upon which the government has launched its assault upon the order of dismissal entered below.

Mr. Swindler also made an in-court identification of the defendant as the shorter of the two men, the one with the pistol. (Tr. 205) The victim further testified that he had described this man to the police at the time of the robbery as five feet ten or eleven inches in height, wearing a brownish sport coat with designs in it, black trousers, black crepe soled shoes and wearing a plaid shirt open at the collar. He then responded to police headquarters where he was shown 175-200 color slides of suspects. He there identified two color slides of Mr. Skeens, referred to by Mr. Swindler at trial as "Skinner."[2] (Tr. 208)

DIRECT EXAMINATION

"Q. Now, what was the difference between the two slides themselves, what was the difference in the pictures themselves?

A. Well, one picture, one slide was older than the other slide.

Q. All right. Now, coming back to the first slide for a moment, when you saw the first slide, or you recognized the first slide, do you recall what you said?

A. Do I recall what I said?

Q. What you said when you saw him, did you say something?

A. I said that looked like him there.

Q. When you saw the second slide, do you recall what you said?

---

[2]"Skinner" is appellee's nickname and for one who had never seen or known the robbers prior to the crime, (Tr. 232) it was obvious to trial counsel that Mr. Swindler was obtaining additional information about the defendant from some source.

A. I said that's him right there, the same person." (Tr. 209)

CROSS-EXAMINATION

Mr. Swindler indicated that the robber identified as Skeens was as close as 1 1/2 feet away from him during the robbery. (Tr. 223) During trial the defendant left his seat and stood in front of the witness. When asked how old Skeens looked, the witness replied "early forties." (Tr. 224). He also indicated that he thought the shorter man to be in his early forties at the time of the hold-up. A police flash radio lookout was marked as Defendant's Exhibit No. 2; it described two white males in their early thirties. (Tr. 225) Skeens was born September 16, 1921. (Tr. 444) When asked if he remembered telling the first officers on the scene that the two hold-up men were in their early thirties, Swindler replied, "No, I don't". (Tr. 226) At the time the slides were shown at headquarters, Mr. Swindler recalls Officer Blancato having been there. Also newly revealed was the fact that Mr. Swindler let a picture of the defendant go by the first time it was projected on the screen without calling its attention to the police.

"Q. You just let the slides go on?

A. Right.

Q. And then it came back to this man?

A. Right." (Tr. 236)

Mr. Swindler was sure this was a reappearing slide of the defendant, but didn't know if this was the first or second of the two slides he later identified.

"Q. In other words, the first one you saw that you didn't say anyting about could have been either 3 or 4? [Exhibit nos.]

A. Right." (Tr. 236)

When Mr. Skeens' picture appeared for the second time, the victim recalls stating to the officer, "That looks like the shortest man that held me up." (Tr. 239)

"Q. And at that time were you positive that was the man?

A. Right

Q. No question in your mind?

A. Right." (Tr. 240)

He was then asked whether he recalled testifying eight days after the robbery in the office of the then United States Commissioner and replied affirmatively. (His trial testimony was taken on February 18, 1969, some 20 months after the robbery.) When asked if he hadn't testified thusly before the Commissioner:

"He asked me if I am sure and I said, No, I'm not sure, it looks like him;"

Mr. Swindler replied, "No, I didn't say that." (Tr. 242)

When shown a transcript of his former testimony, he replied that it was incorrect and untrue. (Tr. 242)

Counsel then produced a tape recording of Mr. Swindler's former testimony, still on file in Mr. Wertleb's office.

"(At this point the tape recording is played as follows:)"

* * *

"Question: Nobody said anything when you said, 'That looks like the man'."

"Answer: He asked me if I am sure and I said, 'No, I'm not sure, it looks like him.' " (Tr. 248)

Mr. Swindler then relented at trial and testified: "The first picture, I wasn't sure." (Tr. 249)

"Q. All right. Now then, after you said 'No, I'm not sure, it looks like him,' the policeman said 'I am going to pick him up,' and you said, 'I'm not sure, it looks like him,' isn't that correct?

A. No, it is not correct.' " (Tr. 251)

* * *

"(At this point the tape recording is played" as follows:)

Answer: He asked me if I am sure and I said, 'No, I'm not sure, it looks like him.'

Question: Then what happened?

Answer: He said, 'I am going to pick him up.' And I said, 'I'm not sure, it looks like him.' " [End of recording]

* * *

[Trial Resumed]

"Q. So you in fact said it to the officer at that time, is that correct?

A. I probably did.

Q. And the reason you said it is because you weren't sure that Mr. Skeens was the man, isn't that correct, at that time?

A. At that time I might not have been sure." (Tr. 253)

* * *

"Q. It is not correct that you were positive? This has helped refresh your memory, hasn't it?

A. Right.

Q. Okay. After you weren't sure, the police, about five minutes later located another picture of the defendant, is that right?

A. Well I guess so.

Q. And they had another picture and they put it in the slide viewer for you to see, is that right?

A. Right.

* * *

Q. So it is correct to say they found a picture of Mr. Skeens about five minutes later and took that picture and put it in the viewer and showed it to you, is that right?

A. Right." (Tr. 254)

Mr. Swindler was then positive of this second picture. (Tr. 255)

"Q. Before I ask you any further questions, do you remember the officer saying, about the man that was on the screen saying to you, 'He ain't too long been out, he's been released. He didn't say when but he said he's out on the street.' Do you remember the officer telling that to you?

A. No." (Tr. 255)

Reading the preliminary hearing transcript did not refresh Mr. Swindler's recollection.

"(The tape recorder is played as follows:)

Answer: I said he looked much better. One picture was clearer than the other picture.

Question: What was said to you by any of the officers present after that?

Answer: What was said to me? You say, What was said to me?

Question: That's right.

Answer: He says, 'He ain't too long been out, he's been released.' He didn't say when but he said, 'He's out on the street.' " [End of recording] (Tr. 257)

FURTHER CROSS-EXAMINATION

"Q. After you had told—weren't you asked this question before the Commissioner: 'After you were told that it hadn't been too long since he had been out, did he ask you if you were positive? Answer: Yes. Question: And that's when you stated you were positive, is that correct? Answer: I says, If I see them both together I could identify them much plainer but he do look like the shortest man that held me up.' Did you not say that to the policeman?

A. Right.

Q. What you were saying is you wanted to see both men together in person, isn't that right?

A. Right.

Q. And the reason you wanted to see them together in person is because you could be surer in your mind when you saw someone in the flesh—right?

A. Right." (Tr. 260)

Mr. Swindler additionally testified that the defendant was never placed in a lineup for him to pick out. However, the day after the robbery and arrest of Skeens and one Francis Reichert, Sergeant Blancato picked Swindler up at work and took him to the U. S. Commissioner's office. Mr. Swindler sat there for about one hour when Blancato retrieved him and told him to come along. Blancato then had Mr. Swindler stand in the doorway opposite the U. S. Commissioner's cellblock.

"Q. And as you were standing in that doorway, across from you, two suspects, just two, were brought out that you saw; isn't that right, two suspects in custody?

A. Right.

Q. Two white males—right?

A. Right.

Q. And you saw them and you said to Officer Blancato 'Those are the two guys that held me up,' right?

A. Right." (Tr. 264)

The witness also stated that prior to being picked up by the police that morning, Mrs. Bugg had informed him that the police had called and indicated that they thought they had the two men who had robbed him. (Tr. 265-266)

The entire government redirect examination of Mr. Swindler consisted of the following:

"Q. Are you sure that is the man who robbed you?

A. Right.

[Prosecutor]: No further questions." (Tr. 271)

After this testimony, and contrary to his opening statement, the prosecutor rested his case. (Tr. 275). When reminded of his opening statement, counsel called his decision to rest, a tactical matter.

"[Defense Counsel] Your Honor, in light of this 'tactical' decision of the government, we would ask that the officers—I be allowed to call them and examine them as any adverse witness . . ." (Tr. 276)

Before allowing defense counsel to call the officers as hostile witnesses however, the Court required a proffer to demonstrate hostility. Defense counsel indicated that the arresting officers were highly motivated against James T. Skeens, because the latter in the role of informant had helped convict Sergeant Blancato's friend and former policeman Thomas Donohue, on whose behalf Blancato had

testified. Skeens' cooperation with the government had also helped to convict—it was further pointed out—Lawrence Wallace, Lieutenant Wallace's brother and that both of these men were sentenced to substantial jail terms only ten days before Skeens was arrested herein *i.e.*, on May 5, 1967.

> "The government monitored and recorded certain face-to-face and telephone conversations between appellants Wallace and Donohue and their acquaintance James Skeens, a sometime gambler who was a party to the government surveillance." *Wallace v. United States*, 134 U.S. App. D.C. 50, 52, 412 F.2d 1097 (1968) (Affirming their convictions.)

"The Court: Who were the officers that went to the house of Officer [*sic*] Skeens?

[Defense Counsel]: Officer Blancato and Lieutenant Wallace . . .

Captain Wert of the Internal Investigation Unit has investigated this case from the defense point of view because of what the police department considers the gross improprieties of these two officers. Captain Wert informed me that Lieutenant Wallace, who he thought was the acting head of the Robbery Squad on the day of the arrest was working day work, and there was no reason for him to be there at the time of the arrest, especially knowing that his brother was convicted by this man. Secondly, at the time of the arrest at Skeens' house, there was taken out of his house numerous documents relating [to the] Barnes investigation. I will read off to your Honor what they are." (Tr. 279)

* * *

"We marked as Defendant's Exhibit 5 yesterday, a picture of a man named Red Pope. You will remember when I asked Swindler, 'Is this the defendant,' he took a very long time before he said, 'No.' I am sure that everyone in the courtroom recalls that.

At the time he was arrested by Officer Blancato–that is to say Red Pope–the date is 5/28/67–Pope was wearing a brown tweedish type sport jacket.

In addition, Officer Blancato told Mr. Sherbacow, prior counsel, that he found out the source of the shotgun. That is Officer Blancato told Mr. Sherbacow. And, the source of the shotgun in the Swindler hold-up was Red Pope, according to Officer Blancato.

Now, he also informed Mr. Sherbacow that he had recovered shotgun shells, and he even showed Mr. Sherbacow the type of shotgun involved–it was one that hung from the belt with a loop, a swing-type shotgun.

At this time under Brady v. Maryland, I want to put Blancato on the stand to inquire about that. He has fantastic evidence favorable to the defendant.

I want a voir dire examination of Officer Blancato concerning Red Pope, a known, and I believe convicted robber. (Tr. 280-281)

Detective Sergeant Blancato then testified pursuant to this defense request out of the presence of the jury. He stated that Red Pope was in fact Claude K. Pope, a convicted robber, who was about the same age as the defendant. Detective Blancato stated that he arrested Pope in May of 1967, "he was a parole violater when we arrested him." (Tr. 285) When asked whether he had told Mr. Sherbacow in June of 1967, on the third floor of this court house that the source of the shotgun in the Skeens case was Red Pope, he replied "No, sir. I didn't say that." (Tr. 286)

> "I told Mr. Sherbacow that we got information that the defendant Skeens and another man by the name of John Scott had hired Red Pope to kill the victim, and that the shotgun used in the holdup was stolen from a house in Prince George's County, and we knew

where the shotgun came from. I never said that Red Pope told me where the shotgun was.

Q. You never said you found the source of the shotgun and had ammunition?

A. Yes, we had ammunition. We had ammunition and we knew where the source of the shotgun came from, yes sir.

Q. Who was the source of the shotgun?

A. I am not going to tell you. He is a very reliable informer.

Q. In other words, you know the source of the shotgun in the Duke Zeibert holdup, but you are not going to tell us?

A. No, sir.

Q. Do you have the shells now?

A. Yes, sir.

Q. Swing type shotgun?

A. I don't know what kind, but there are ammunition.

Q. Where was it recovered, officer?

A. The shells?

Q. The gun?

A. We don't have the gun.

Q. I thought you just indicated–

A. You didn't ask me that, Mr. Palmer. You asked me if we had the ammunition, and I said, yes we had the ammunition.

Q. Was that recovered from Red Pope?

A. It was recovered from a home or house where Red Pope had frequented just before we arrested Red Pope. That was from a home of a man by the name of John Trevvett.

Q. But he is not the source of the shotgun, I take it?

A. No, sir.

Q. Is there any question in your mind that the source of the shotgun in the Duke Zeibert holdup as you know it, is correct?

A. Yes, I would say the information is correct. We never found the shotgun, no, sir . . .

Q. . . . Who were they supposed to kill?

A. The victim Nathaniel Swindler.

Q. The victim. Who told you that?

A. The informer.

Q. . . . Without getting to the killing–just the source of the shotgun as being from Red Pope.

A. Mr. Palmer, Red Pope, as far as I know, never had access to that shotgun. I think I know what you mean. The victim was shown photographs of Red Pope. I know that Mr. Sherbacow insisted that it was not Skeens–that it was Pope. But, we investigated all of this, and Red Pope was not involved in the holdup of Duke Zeibert." (Tr. 286-289)

Upon the conclusion of Detective Blancato's testimony defense counsel moved for production of the informant. After further colloquy including a proffer of what the alibi defense would be so that the Court's factual picture would be complete re the necessity for informer production (Tr. 298-301), Sergeant Blancato resumed the stand out of the jury's presence for further testimony about his informer.

"Q. The informant that you didn't want to disclose to us, without telling us who he is, what is his relationship to the shotgun?

A. I am not going to tell you that either. He told us where the shotgun came from. You mean, does he own it or anything like this. No, this is not what I said.

Q. We are trying to clear it up. That is all. This informant knew who owned the shotgun I take it?

A. Yes, sir.

Q. And, that was not Mr. Skeens or Mr. Reichert?

A. No, sir.

Q. This informant spoke to the owner of the shotgun?

A. I don't know this. I never asked him.

Q. But, this informant that you know does know the owner of the Duke Zeibert shotgun?

A. I don't know this either. I am telling you that he told me where the shotgun came from . . .

"The Court: When you say the shotgun, Officer Blancato, was it identified by your informant as the gun that was used in this case?

The Witness: Yes, ma'am . . .

[Detective Blancato] The informant told us at the same time when we found out about the shotgun, that they had hired a man by the name of Red Pope to kill the victim, and that Red Pope was a parolee, and that the gun was then at an address on 13th Street. We went to the address on 13th Street, and turned up at the house of another thief, by the name of Travvett and talked to his girlfriend. We recovered ammunition, a shotgun shell, some parole papers belonging to Red Pope, pinch bar, and we went looking for Pope. We found Pope in the Alamo Restaurant on 14th Street.

We arrested him and brought him to headquarters, because we knew he was wanted for violation of parole. We had checked this. He was turned over to the Marshal's office. He was never charged with conspiracy to kill the victim in this case. We got another call from the informer.

The Court: Why not?

The Witness: Well, we had nothing to back up what was told by the informant–just the informant's word, who I would not bring into Court . . ." (Tr. 306-308)

* * *

[By Defense Counsel]

"Q. . . . Now, getting back to your informer. He is pretty reliable?

A. Oh, very reliable.

Q. Credible?

A. Very much so.

Q. All right.

A. He told me things as recently as three weeks ago.

Q. Good. This credible informant, when he indicated that the shotgun was stolen from another thief's house, which thief was it stolen from?

A. I never asked him and he never told me . . .

Q. Did he tell you who stole it from the thief's house? That he told you?

A. No, Sir.

Q. You didn't ask that?

A. No, sir. I wasn't interested in who stole something in Maryland.

Q. You weren't interested in who had possession of the shotgun?

A. I was told who had possession of the shotgun.

The Court: That was Mr. Pope?

The Witness: No, that was Mr. Reichert. This house where we recovered this stuff was also. While Travvett was in jail, this woman was living with Reichert at this house . . .".

[By Defense Counsel]

"Q. Do you have any notes about that?

A. There is some of it in there . . . .

Q. What do you have written down there, Officer?

A. 10:30 p.m. on May 27th to 1030 13th Street, Northwest, Apartment 218, looking for Red, meaning Pope, interviewed Kay Travvette McCurrie, white female, 31 of above, phone 347-6977. She has seen Pope with sawed-off shotgun in February, 1967, and also seen Reichert with Pope about the same time she saw the shotgun. Also she said that Travvett had a luger type weapon when he stayed with her in November, '66. Received a box of Luger ammo, 12 gage shotgun shell, paper for Pope, cutting shears . . . May 29, 1967, 8:55, informer called again and stated they hired another guy by the name of Lewis to kill the complainant, and was supposed to do the job either Wednesday or Thursday of this week, and the informer will keep us posted . . ." (Tr. 310-313)

[By Government Counsel]

"Q. Did the informant say who had possession of the shotgun at the time of the crime?

A. He told– . . . This when he told me about Reichert's girlfriend . . . he said her name was Kay. He told us the address and the apartment number . . .

* * *

Q. Did the informant ever tie Reichert up with this?

A. Yes, he told me that Reichert was the one that carried the shotgun, and that the shotgun was then at Reichert's girlfriend's house, where it had gone after the holdup.

Q. He told you that Reichert carried the shotgun at the time of the Duke Zeibert robbery, is that right?

A. Yes, sir." (Tr. 316-317)

After further colloquy Judge Green stated:

"The Court feels that Mr. Palmer has a right to cross examine this informant and to find out whether, in fact, Mr. Reichert was the one with it or whether it was Red Pope who was with it, and something thoroughly unrelated.

And, the Court first of all feels that certainly a subpoena should be issued, I would think, to bring in this woman who has been mentioned in the case . . . Insofar as the informant is concerned, the Court will not have him produced in open Court, but will do all possible to keep his identity.

[Defense Counsel]: Your Honor, the best way to do it as I see it, is have him come into your chambers. I, as an attorney, and member of the Bar, will not reveal this man's name. It will remain in my confidence. It will not be revealed to anybody. I so advise the Court." (Tr. 321)

After the noon recess a further conference was held in Judge Green's chambers. At that time Judge Green indicated that she was

willing to meet with the informant at a site away from the court house for the latter's protection. (Chambers Tr. 1, February, 1969 hereinafter Ch. Tr.)

Government counsel indicated at that time that he had not asked Detective Blancato who the informant was nor did he know his name. Sergeant Blancato stated that he had spoken with the informant about 30 minutes earlier at which time he was given the additional information that the shotgun had been stolen by Reichert from John Scott's Coffee Shoppe and that the gun had originally been stolen from a home in the Cheverly area of Maryland in the summer of 1966. He further stated that the informant was frightened, would not come in, and will not talk to anyone. It was indicated that Sergeant Blancato feared for the man's life. According to Blancato, his first contact with the informant about the instant case came approximately three weeks after Skeens' arrest for the robbery. (This three week figure is patently inaccurate as defense counsel at the time pointed to a handwritten note of Blancato's dated May 27, 1967, concerning a conversation with the informant about this case. Ch. Tr. 4)

> "The Court: The Court has further ordered that not seeing eye to eye with [the prosecutor] that this is—we certainly agree—this testimony is not necessary for the arrest and that I do not think figures in there at all insofar as the case is concerned. I don't believe it is the defense's contention.
>
> [Defense counsel] Oh, no.
>
> The Court: But to decide this is not important to their defense—and I am well aware of the difficulties involved in revealing an informer, and I realize the seriousness of it. On the other hand under the cases we must consider whether or not he would be helpful to the defense in the defense of their case . . . it

> would seem certainly imprudent to tie the defense's hands in such a way he is not to make this available to them in this matter of who had the gun and where was Pope brought into this . . . . It seems a bit impossible for this Court to say that the defense may not have access to this informer to find out just exactly where and what the position of Pope was in this matter and Reickert because it still has not tied in with this defendant Skeens and Reickert is out of this case having been dismissed as part of the identification hearing before Judge Bryant. And so the Court reluctantly rules if he isn't made available I feel I would have to dismiss the case." (Ch. Tr. 7-9)

The subsequent procedural maneuvers by the government in this Court are outlined in appellant's brief at pages 5-8.

DEFENSE CASE

The first witness called by the defense was Detective Sergeant Louis Blancato. Before his testimony is outlined, we would like to point out that in Judge Green's order of August 7, 1969, dismissing the indictment—from which the instant appeal was taken—she took the unusual step of alluding to "prejudicial testimony having been injected into the case by Detective Sergeant Blancato." His testimony before the jury was taken February 20, 1969. When the trial began on February 17, 1969, defense counsel stated to the Court:

> "I would like to indicate for the record also that when Officer Blancato testifies to have him admonished just to answer my questions, so he doesn't give non-responsive answers, and especially if he talks about Skeens not to put in any hearsay about knowing him as a holdup man or something like that.
>
> [Prosecutor] Your Honor, I will take it upon myself to speak to Officer Blancato." (Tr. 5)

Furthermore since knowledge of the informer and his alleged statements were only available to us through Sergeant Blancato, we believe *his* truthfulness as a witness as it appeared to the Court, in addition to any indication of bias, are very important factors in presently assaying whether or not Judge Green acted corretly in ordering production of Sergeant Blancato's informant.

1. Sergeant Blancato testified that on the morning of the robbery Mrs. Bugg called him to say "as near as she could figure at that time the cash was less than $5,000." (Tr. 376)

1a. Mrs. Bugg, as indicated earlier, testified that the cash figure never dropped below $5,997.48. (Tr. 137)

2. Defense counsel asked the detective for any notes he had made reflecting a figure of less than $5,000. In response he produced a document we marked as Defendant's Exhibit No. 6. "You can probably see where I crossed off the amount of cash she first gave us. I didn't say forty-nine, I said less than five . . ." "You erased it so completely it is no longer legible, is that correct. A . . . I just crossed it off . . ." (Tr. 377-378)

2a. After defense counsel stated: 'At this time I want to submit that to the F.B.I. laboratory for analysis to determine what figure was under those scratches, if they can. (Tr. 379) the prosecutor handed counsel a clean copy of Exhibit 6, which revealed the obliterated figure as "15, 211.72" in cash and checks. (Tr. 381)

> "Q. I repeat the question: is there anywhere in your file a statement from Mrs. Bugg that the amount taken was less than $5,000.00?
>
> A. I guess not, no, sir." (Tr. 382)

The uninitiated may wonder what possible relevance this dollar amount had to do with the issues at trial. Its relevance appeared in

further questioning of Sergeant Blancato which indicated that F.B.I. Agent Phillip Harker [incorrect in transcript as Harper] appeared at police headquarters while Mr. Swindler was looking at the color slides, and that Blancato knew the F.B.I. did not concern itself with robberies under their jurisdictional amount of $5,000 (Tr. 383) Blancato told Agent Harker that the amount of cash involved was under $5,000 and the latter "picked up his bags and left." (Tr. 385)

An independent witness to the photographic identification process had thus been eliminated.

3. Compare Mr. Swindler's trial testimony and the U.S. Commissioner's tape recording of him, with the police affidavit for Skeens' arrest, which is contained in the record on appeal.

The affidavit stated *inter alia*:

> "At 11:45 a.m., May 15, 1967, the complainant was shown three reels of color slide photographs (80 photographs per reel). Upon getting to the color photograph of James T. Skeens, he positively identified the photograph of Skeens as the No. 1 subject, who is the shorter of the two men. He was shown several more reels of film and upon coming to a later photograph of Skeens taken in May, 1966, the complainant jumped up from the chair and stated 'that's him.' "

4. On May 16, 1967, Mr. Swindler was seated in an anteroom *adjoining* the U.S. Commissioner's hearing room because—according to Blancato—the latter room was so packed you "couldn't hardly get in the door." (Tr. 393)

4a. Paul Sherbacow, former defense counsel for Skeens and at the time of trial an Assistant United States Attorney for the District of Connecticut, testified that he represented Mr. Skeens on the

morning of May 16, 1967, before the Commissioner. (Tr. 408, 409, 413.)

"Q. Now, did you have any trouble getting into the hearing room itself?

A. I don't understand.

Q. Did you have any trouble pushing your way through any crowds into the hearing room?

A. No.

Q. Any seats in the hearing room when you went in?

A. Yes.

Q. Was it jammed packed so no one could take a seat out there?

A. There weren't many people there at all. This is the 16th you are talking about?

Q. Right.

A. No, there were not . . . ." (Tr. 416-417)

5. Because of this allegedly packed hearing room, Sergeant Blancato took Mr. Swindler through the U. S. Commissioner's private office which conveniently exits into the hearing room, opposite the cellblock from which the prisoners emerge. As the officer and Mr. Swindler were going through the doorway into the hearing room, Skeens and Reichert in the custody of a U. S. Marshal *chanced* to simultaneously enter the room from the cellblock. (Tr. 392 - 395)

"[Swindler] wasn't standing there, we weren't going to stand there . . . He was walking through the room when the other door opened . . . ." (Tr. 394)

5a. Compare Mr. Swindler's earlier described testimony:

"Q. . . . Officer Blancato had you stand in the doorway, isn't that right? Do you remember he took you to a doorway?

A. Right.

Q. And as you were standing at that doorway, across from you, two suspects, just two, were brought out that you saw . . . .?

A. Right." (Tr. 264)

At that time he identified these two to Blancato as the holdup men.

6. When Blancato was questioned before the jury about Red Pope the following occurred:

"Q. All right. You arrested Red Pope you told us on the 27th?

A. Yes, sir.

Q. For what?

A. Because he had a contract to kill a victim." (Tr. 406)

6a. When questioned earlier out of the jury's presence he had indicated re Pope's arrest:

"We arrested him and brought him to headquarters because we knew he was wanted for violation of parole. We had checked this. He was turned over to the Marshal's office. He was never charged with conspiracy to kill the victim in this case . . . ." (Tr. 308)

Because of this purposeful introjection of a "contract to kill a victim" testimony, the government itself suggested a mistrial. (Tr. 407) The defense, however, did not move for one on tactical grounds. (Tr. 407), but did remind the Court of previously having had the prosecutor caution the witness about his answers before any testimony had ever been taken.

"I told you that man is a dangerous brutal witness" (Tr. 407)

Perhaps at this point in the trial the Court was fully convinced of something stated by defense counsel when the informer production issue was debated at the earlier meeting in chambers.

> ". . . other police officers told me when I indicated that Sergeant Blancato would come with the informer that they didn't think that there was, that he had a man who gave that information. That was Captain Werk and Sergeant Merandes (phonetically spelled), who investigated the Barnes case over about a year and a half ago or two years.
>
> Their statement to me was that if that witness chair was a lie detector test Blancato's ears would light up. These are policemen." (Ch. Tr. 4)

More on Sergeant Blancato

7. "Q. At 10:06 in the morning of June 6 or 7, on the third floor of this court house—answer the question as I ask it—did you not tell Mr. Paul Sherbacow that the source of the shotgun was Red Pope, yes or no?

A. No." (Tr. 405)

7a. Testimony of then Assistant U.S. Attorney Paul Sherbacow.

"Q. On the 6th or 7th of June at about 10:06 in the morning on the third floor of this building did you see Officer Blancato?

A. Yes, I did.

Q. Did you have any discussion about the shotgun used in the Duke Zeibert hold-up?

A. Yes.

Q. Did he indicate he knew the source of the shotgun?

A. Yes, he did.

Q. Did he tell you who the source was?

A. Yes.

Q. Who?

A. A man by the name of either Red, or Reds Pope." (Tr. 426)

Sergeant Blancato

8. "Q. This sawed-off shotgun was supposed to be a swing-type.

A. I don't know.

Q. You did not also tell Mr. Sherbacow at that time it was a sawed-off 12 gauge shotgun that hooks onto here so it swings and when it drops the man covers it up with his coat?

A. How could I tell him that? I don't even know what kind of shotgun it was." (Tr. 405-406)

8a. Mr. Sherbacow

"Q. Did [Blancato] describe the shotgun to you?

A. Yes, he did. His description of it was a swing-type shotgun and I didn't know what it meant. First time I ever heard the term and I asked him to explain it to me and he explained it to me. He gave me the length of it, said 12 inch sawed-off shotgun and swing-type and I asked what swing-type meant and he described it as something to be attached to the belt and used with one hand and dropped. It wouldn't drop to the ground, it was attached to the belt somehow and hung under the coat?" (Tr. 426-427)

Odds and Ends on Sergeant Blancato

9. Although Swindler testified that he let a picture of Skeens go by the first time it appeared only to appear a second time (Tr. 236), Blancato stated "no chance of that". (Tr. 435-i)

"No, sir. He couldn't have seen a picture of Mr. Skeens go by. That was the only picture at that time in the file.

Q. That testimony would surprise you, wouldn't it?

A. Yes, sir, it certainly would." (Tr. 435-j)

10. As to the second picture shown to Mr. Swindler.

"Q. So you disagree with Mr. Swindler's testimony that you took that picture, threw it in and put it on the wall, that is incorrect?

A. Yes sir . . . ." (Tr. 435-m)

11. When this case was first called for trial, defense counsel asked to have excluded a post arrest statement made by Skeens in his home to the effect "that he was alone." (Tr. 5-6) As will be recalled, one Francis Reichert was arrested therein a short time later. The Court ruled Skeens' statement inadmissable (Tr. 7, 15.)

11a. Government Examination of Sergeant Blancato

"A. And then I walked in and I read him his right, told him, advised him of his rights, also and he was asked if he was alone in the house and he said—

Q. Now just a minute. Then shortly thereafter he was searched is that right?

A. Yes, sir. (Tr. 517)

* * *

Q. . . . Now what did you do yourself after he was searched?

A. . . . he was told to sit on the sofa and we started asking him if—who will take care of the kids and *he said he was alone* and that he . . . ."

[Defense Counsel] . . . May we approach the Bench? (Tr. 517-518)

[At the Bench]

[Prosecutor] . . . As your Honor saw, I just cut him off a few minutes ago. . . . I told him that it had been excluded." (Tr. 518)

Alibi Defense

Parole Officer Howard C. Wood testified that in May of 1967, Mr. Skeens was in his charge as a parolee for lottery law violations. On the day of the robbery the defendant had made a routine visit to Mr. Woods office at 300 Indiana Avenue, N.W. upon the latter's request. He placed the time he saw Mr. Skeens in his office at 11 a.m.

"Q. Did Mr. Skeens indicate where he was going after seeing you?

A. I believe he said something about going to see his lawyer. (Tr. 554)

* * *

Q. . . . Where was his wife at this time?

A. From recollection I—

Q. As best you can recall.

A. I believe that he said she may have been waiting downstairs in an automobile.

Q. She was supposed to be with him at the time?

A. Yes." (Tr. 554-555)

Attorney Meyer Koonin testified that on May 15, 1967, he had occasion to be in this court house before Judge Matthews.

"I was in her courtroom from ten o'clock in the morning until about 10:30 in the morning . . . .

Q. What time did you get to the main floor, would you say?

A. I think I stopped somewhere in the corridor and chatted with somebody and again I would say about 10:35 or 10:40 [Just about the time the robbery was being commited.]

Q. About the time you hit the corridor did you see any woman that you knew?

A. As I reached the main corridor, yes, I did . . . .

Q. Who did you see?

A. I saw Mrs. Marsha Skeens . . . .

Q. Did you know Marsha Skeens before May 15 of 1967?

A. I did.

Q. Pretty well?

A. Very well."

CROSS-EXAMINATION

"Q. . . . How do you place this 10:35 or 10:40 time? Is it an approximation of the time it took you in front of Judge Matthews?

A. No. It is a recollection of having looked at the clock in the courtroom as I departed the courtroom." (Tr. 441)

Mrs. Skeens was unavailable to the defense to tie the time sequence with the parole officer together, because she had been killed prior to the trial.

Paul Sherbacow testified that on May 15, 1967, Mr. and Mrs. Skeens were in his office at 601 Indiana Avenue, N. W. from be-

tween 11:10 or 11:20 a.m. until 12:00 noon. Mr. Skeens was dressed in a "blue suit, white shirt, blue and gray striped tie, black shoes." (Tr. 412)

"Q. Mr. Skeens' black shoes . . . did they have thick crepe soles on?

A. No, they did not.

Q. What style were they?

A. They were pointed toes–I describe them as Italian shiny, black leather shoes.

Q. Had you ever seen the shoes before?

A. Yes, I had.

Q. Any reason you remember them?

A. I remember them because they were identical to a pair I had to buy for my wedding and I hadn't worn them since." (Tr. 412-413)

Sergeant Blancato also testified that $2,676 in cash was seized from Skeens' house on the evening of May 15th. (Tr. 448) We also established through him that a large amount of numbers slips on flash paper was seized at the same time. (Tr. 468-469) We further showed that Skeens was charged by information in Prince George's County Maryland with running a lottery and possession of numbers slips growing out of this May 15, 1967, seizure from his home. (Tr. 472-473)

Cross-Examination of Sergeant Blancato
Re the Search of Skeens' Home

"Q. Did you find a sawed-off shotgun?

A. No, sir.

Q. Pistol?

A. No, sir.

Q. Blue canvas airline bag? . . .

A. No, sir.

Q. Did you find any checks from Duke Zeibert's?

A. No, sir." (Tr. 460)

The Court refused a defense request to call a Metropolitan Police Department polygraph operator who had administered a socalled lie detector test to Mr. Skeens on July 3, 1967, concerning the robbery, which in the opinion of the operator, Sergeant Preston, was not committed by the defendant. (Tr. 563-565).

ARGUMENT

With the decision in *Roviaro v. United States*, 353 U.S. 53 (1957), the previously assumed inviolable walls of the so-called informer's privilege were severely breached.

> "At the outset, it is important to recognize–said this Court recently–that *Roviaro* considerably changed the character of the privilege. Prior to the decision of that case, the informer's privilege was broadly conceived and frequently considered an 'absolute' one . . . ." *Westinghouse Electric Corp. v. City of Burlington Vermont*, 122 U.S. App. D.C. 65, 351 F.2d 762 (1965)

Roviaro in postulating a balancing test for informant disclosure vel non, interred most prior learning on the subject and challenged the lower courts to critically assay the record before making what was henceforth to be, an informed judgment.

> "Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged the *possible* defenses, the *possible* significance

of the informer's testimony, and other relevant factors." 353 U.S. at 62 (Emphasis supplied)

Later Supreme Court cases made it clear however, that the main thrust of *Roviaro* was aimed at trial fairness where guilt or innocence lay in the balance, as opposed to frequently aired probable cause to arrest or search pretrial issues. *Rugendorf v. United States*, 376 U.S. 528 (1964); *McCray v. Illinois*, 386 U.S. 300 (1967). In the latter, probable cause area, the challenged evidence is normally most probative of guilt and its admissibility does not affect the integrity of the fact finding process. There is accordingly, a paramount interest to protect the flow of information leading to crime solution, and the balance swings toward non production so long as the law enforcement officer can be fully probed about his conclusion of informant prior reliability. Fears of unjust conviction in these circumstances are, of course, minimal. Even in probable cause situations, though, informant production is required to prevent subversion of Fourth Amendment considerations, when the good faith or credibility of the officer is seriously challenged. *People v. Clifton*, 42 Ill. 2d 526, 250 N.E. 2d 649 (S.C. Ill. 1969) (Informer production at motion to suppress held proper, where sufficient doubt existed as to whether police or defendant was truthful concerning the arrest.) Accord *Scher v. United States*, 305 U.S. 251, 254 (1938); cited with approval in *Roviaro v. United States*, supra at f.n. 9.

In analyzing the cases and propounding a rigid "actual participant or witness to the offense" theory of disclosure (appellant's brief 12-14), appellant has apparently overlooked the specific injunction of *Roviaro*, "that no fixed rule with respect to disclosure is justifiable." 353 U.S. at 62. While it seems, that some may balk at a careful perusal of "the particular circumstances of each case" approach to the informer production issue, in favor of an easily

brandished shibboleth or two, the task of arriving at an informed judgment is not so easily met.

The government's case against appellee can generously be described as "paper thin." It may or may not have reached the threshold of legal sufficiency through a pliable complainant whose identification processes were deftly aided by a police presence clearly hostile to James Skeens. A further weakening of the government's case was effected by strong indications that Skeens was at another location when the crime was in progress. The deceased Mrs. Skeens would have provided a powerful corroborative link to her husband's presence in the court house area at about 10:35 or 10:40 a.m., when she was herself undeniably seen in that vicinity by attorney Meyer Koonin at the critical time in question. Thus, a "relevant factor" in determining the correctness of Judge Green's ruling was an impaired defense in need of additional exculpatory testimony to be secured, perhaps, through Sergeant Blancato's informant.

There was ample suggestion in the record that a person other than appellee was one of the hold-up men. This informant—as best we can glean from the record—never told Sergeant Blancato that appellee was actually involved in the Duke Zeibert robbery.

And yet this shadowy figure was close enough to the robbers to allegedly know:

1. That Skeens and John Scott hired Red Pope to kill the victim of the robbery.

2. Where the shotgun used in the holdup came from.

3. That Francis Reichert held the shotgun during the robbery.

4. The location of Reichert's girlfriend's apartment where the shotgun was supposed to have been deposited after the robbery and

where, in fact, a shotgun shell and Luger ammunition were recovered by the police.

5. That after Red Rope's arrest on May 27, 1967, another man by the name of Lewis had been hired to kill the victim on Wednesday or Thursday of that week.

It would appear that in the realm of human experience it is unlikely that participants in an armed robbery and a conspiracy to murder, broadcast their criminal endeavors willy nilly to friend and foe. It is more likely, we suggest, that only an insider would be privy to such machinations that can lead to a lifetime in jail—and then some.

In the face of these factors and a proclaimed "examination of the record" (Appellant's Br. 14) plus "a close analysis of what the informer communicated to the police" (Appellant's Br. 15) we are truly surprised that appellant concludes with conviction: 'it is virtually certain that the informant did not participate in any way in the commission of the offense, nor does it seem possible that he was even a witness to the event." (Appellant's Br. 15.) Per contra, we think it more probable, based on the record in the light of the realities of life, that the informer was a participant in the robbery either as a combatant or getaway car driver. On this theory alone the government would concede, if we read its brief correctly, that the informant was producible as "an actual participant or witness to the offense." This postulation is bolstered by Blancato's unwillingness to reveal his informant's relationship to the shotgun. (Tr. 306)

While thus indicating "an examination of the record" and a "close analysis" of the informer's communications to the police, we believe appellant's actual failure to deeply delve into that record as reflected by its scanty "Statement of the Case" has led it to rely on facile slogans and cases such as *Anderson v. United States*, 106

U.S. App. D.C. 340, 273 F.2d 75 (1959), for an overturning of the order below. We fail to see any relationship at all between the case at bar and *Anderson*. In the latter case the defendant was arrested on narcotics charges during execution of an informer generated search warrant. "The defendant did not challenge the search but said that the name of the informant would have been helpful to him in preparing his defense." (Appellant's Br. 13) It is obvious that this bald assertion of *helpfulness* was rightly rejected by the Court as not necessitating informer disclosure. Is appellant seriously contending that *Anderson* and the instant record are analogous? Rather, we would point appellant in the direction of Sergeant Blancato's bias toward the defendant and that officer's cavernous credibility gap as rendering an already clear requirement for informant production *absolute*. In the circumstances revealed, why should the defendant have been required to accept Sergeant Blancato's alleged informer revelations as gospel, when this clearly discredited witness had all the reason in his world to suppress a witness favorable to the accused. *Cf. People v. Clifton,* supra, and F.B.I. Agent Harker's engineered exclusion from the photographic identification scene.

This manifest "participant or witness to the crime" theory of support for Judge Green's ruling does not exhaust the basis for affirmance, however, because in the words of *Roviaro*, "the circumstances of this case demonstrate that [the informant's] possible testimony was highly relevant and might have been helpful to the defense." 353 U.S. at 63-64. Consider in this regard, that it was the informant who led to Kay McCurrie who—although conveniently unavailable at trial—was a potentially useable defense witness who could place Reichert and Red Pope together as late as February 1967, and could put a sawed-off shotgun in Pope's hands at about the same time. The other leads conceivably available through this

obviously "close to the source" informant are not chimerical or speculative as is lightly suggested by appellant. (Br. 15-16) The government insists we go further to warrant informer production; proffer more it says, your "mere speculation is not sufficient to meet the . . . burden." (Br. 17)

> "By the very nature of the problem here confronting defendants it is impossible for them to state *facts* which would show the materiality of the informant's testimony. Since they do not know his identity they cannot possibly state factually what he will say if he is required to testify. All that defendants are required to do is to demonstrate 'a reasonable possibility that the anonymous informant . . . could give evidence on the issue of guilt which might result in their exoneration'." *Price v. Superior Court of San Diego County*, 463 P.2d 721, 83 Cal Rptr. 369 (S.C. Cal. 1970) (En banc)

> "The defendant need not prove that the informer would give testimony favorable to the defense in order to compel disclosure of his identity, nor need he prove that the informer was a participant in or even an eyewitness to the crime. The defendant's burden extends only to a showing that in view of the evidence, the informer would be a material witness on the issue of guilt andnondisclosure would deprive the defendant of a fair trial." *Price v. Superior Court of San Diego County, supra*. See especially *Honore v. Superior Court of Alameda County*, 449 P.2d 169, 74 Cal. Rptr. 233 (S.C. Cal. 1969)

In sum, we believe the facts and circumstances of record so cogently demonstrate a legitimate need for informer production, that the trial court's determination to surface this ceaseless source of relevant knowledge should be left undisturbed.

CONCLUSION

WHEREFORE, appellee respectfully requests that the order appealed from below should be affirmed.

Allan M. Palmer
Attorney for Appellee

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,599

UNITED STATES OF AMERICA,

Appellant,

v.

JAMES T. SKEENS,

Appellee.

PETITION FOR REHEARING AND/OR SUGGESTION FOR REHEARING *EN BANC*

Allan M. Palmer
1707 N Street, N.W.
Washington, D.C.

Attorney for Appellee
(Appointed by this Court)

Washington, D. C. · THIEL PRESS · 202 · 393-0625

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,599

UNITED STATES OF AMERICA,

Appellant,

v.

JAMES T. SKEENS,

Appellee.

PETITION FOR REHEARING AND/OR SUGGESTION FOR REHEARING *EN BANC*

After careful consideration of the decision herein we have decided to seek further review of the issue presented because, in our judgment, the majority opinion:

> 1. Misreads the Supreme Court standard to be applied in informer production cases and thrusts a more onerous burden upon good faith requests for such production, which will result in a "chilling effect" upon the trial judges in this jurisdiction granting any such relief—in appropriate cases—for the foreseeable future, and

2. Fails, as is required, to deeply probe the "particular circumstances" of this case necessary to effect a proper balance before an informed judgment can be reached.

FACTS

Because *Roviaro v. United States*, 353 U.S. 53 (1957), requires an in-depth analysis of the record for proper disposition of a request for informer production, we have undertaken in this section to extensively outline the record below for the members of this Court who did not participate in the opinion, so that they may fully appreciate the trial atmosphere in which Judge Green made her ruling.

In the opening round of this criminal case, government counsel stated to the jury that he would produce three witnesses in support of the indictment. Mrs. Bugg would testify that as office manager for Duke Zeibert's Restaurant, she gave bank deposits to Nathaniel Swindler at about 10:30 a.m. on May 15, 1967. Mr. Swindler would testify that he received the money, went out the back door of the restaurant and was held up by two men one of whom was allegedly James T. Skeens. The third projected witness was Detective McCathran who responded to the restaurant and interviewed Mr. Swindler, getting a description of the robbers. Mr. Swindler upon being shown many photographs, picked out Skeens' picture. A warrant was obtained for Skeens, and on the evening of the robbery the latter was arrested at his home. McCathran would also testify—said the prosecutor—that they also found in Skeens' home a man who answered the description of the second hold-up man. "Detective McCathran will also testify that they found in the home of Defendant James Skeens a large sum of money." (Tr. 124-126).

Ruth Bugg testified essentially as outlined. She stated that a deposit slip for about $14,000 was given to Swindler with $5,999

in cash and the rest in checks. The breakdown of the funds had been noted on a piece of paper at the time by Mrs. Bugg, which was moved into evidence as Defendant's Exhibit No. 1. On the day of the robbery Mrs. Bugg informed Detective Sergeant Blancato that about $6,000 in cash had been stolen plus various checks.

CROSS-EXAMINATION

Q. So the $6,000 cash figure actually dropped to $5,997.48?

A. Right.

Q. And it never dropped below that point, did it?

A. No. (Tr. 137)

Nathaniel Swindler testified that on the morning in question he received the bag from Mrs. Bugg, went out the back delivery entrance of the restaurant and started through the alley to the bank. He was confronted by two men in the alley, one of whom carried a pistol and told him to drop the bag, "this is a holdup" (Tr. 204) The second, taller man, standing off to the side also told him to "drop it", brandishing what appeared to be a sawed-off shotgun. After Swindler did as he was instructed, the shorter man picked up the bag and both hold-up men left the alley via an adjoining building. Swindler then returned to Duke Zeibert's and reported the robbery at about 10:40 a.m. (Tr. 214).

Mrs. Bugg had earlier testified that upon his return, Mr. Swindler appeared "very nervous."

"Q. Describe to the members of the jury, if you will.

A. He leaned up against my door and kind of sagged down. He was quite upset.

Q. Was he at all nervous or upset in how he related this incident to you?

A. Yes." (Tr. 137)

Mr. Swindler also made an in-court identification of the defendant as the shorter of the two men, the one with the pistol. (Tr. 205) The victim further testified that he had described this man to the police at the time of the robbery as five feet ten or eleven inches in height, wearing a brownish sport coat with designs in it, black trousers, black crepe soled shoes and wearing a plaid shirt open at the collar. He then responded to police headquarters where he was shown 175-200 color slides of suspects. He there identified two color slides of Mr. Skeens, referred to by Mr. Swindler at trial as "Skinner." (Tr. 208)

DIRECT EXAMINATION

"Q. Now, what was the difference between the two slides themselves, what was the difference in the pictures themselves?

A. Well, one picture, one slide was older than the other slide.

Q. All right. Now, coming back to the first slide for a moment, when you saw the first slide, or you recognized the first slide, do you recall what you said?

A. Do I recall what I said?

Q. What you said when you saw him, did you say something?

A. I said that looked like him there.

Q. When you saw the second slide, do you recall what you said?

A. I said that's him right there, the same person." (Tr. 209)

CROSS-EXAMINATION

Mr. Swindler indicated that the robber identified as Skeens was as close as 1 1/2 feet away from him during the robbery. (Tr. 223) During trial the defendant left his seat and stood in front of the witness. When asked how old Skeens looked, the witness replied "early forties." (Tr. 224). He also indicated that he thought the shorter man to be in his early forties at the time of the hold-up. A police flash radio lookout was marked as Defendant's Exhibit No. 2; it described two white males in their early thirties. (Tr. 225) Skeens was born September 16, 1921. (Tr. 444) When asked if he remembered telling the first officers on the scene that the two hold-up men were in their early thirties, Swindler replied, "No, I don't". (Tr. 226) At the time the slides were shown at headquarters, Mr. Swindler recalls Officer Blancato having been there. Also newly revealed was the fact that Mr. Swindler let a picture of the defendant go by the first time it was projected on the screen without calling its attention to the police.

"Q. You just let the slides go on?

A. Right.

Q. And then it came back to this man?

A. Right." (Tr. 236)

Mr. Swindler was sure this was a reappearing slide of the defendant, but didn't know if this was the first or second of the two slides he later identified.

"Q. In other words, the first one you saw that you didn't say anything about could have been either 3 or 4? [Exhibit nos.]

A. Right." (Tr. 236)

When Mr. Skeens' picture appeared for the second time, the victim recalls stating to the officer, "That looks like the shortest man that held me up." (Tr. 239)

> "Q. And at that time were you positive that was the man?
>
> A. Right.
>
> Q. No question in your mind?
>
> A. Right." (Tr. 240)

He was then asked whether he recalled testifying eight days after the robbery in the office of the then United States Commissioner and replied affirmatively. (His trial testimony was taken on February 18, 1969, some 20 months after the robbery.) When asked if he hadn't testified thusly before the Commissioner:

> "He asked me if I am sure and I said, No, I'm not sure, it looks like him;"

Mr. Swindler replied, "No, I didn't say that." (Tr. 242)

When shown a transcript of his former testimony, he replied that it was incorrect and untrue. (Tr. 242)

Counsel then produced a tape recording of Mr. Swindler's former testimony, still on file in Mr. Wertleb's office.

> "(At this point the tape recording is played as follows:)"
>
> * * *
>
> "Question: Nobody said anything when you said, 'That looks like the man.' "
>
> "Answer: He asked me if I am sure and I said, 'No, I'm not sure, it looks like him.' " (Tr. 248)

Mr. Swindler then relented at trial and testified: "The first picture, I wasn't sure." (Tr. 249)

"Q. All right. Now then, after you said 'No, I'm not sure, it looks like him,' the policeman said 'I am going to pick him up,' and you said, 'I'm not sure, it looks like him,' isn't that correct?

A. No, it is not correct.'" (Tr. 251)

* * *

"(At this point the tape recording is played" as follows:)

Answer: He asked me if I am sure and I said, 'No, I am not sure, it looks like him.'

Question: Then what happened?

Answer: He said, 'I am going to pick him up.' And I said, 'I'm not sure, it looks like him.'" [End of recording]

* * *

[Trial Resumed]

"Q. So you in fact said it to the officer at that time, is that correct?

A. I probably did.

Q. And the reason you said it is because you weren't sure that Mr. Skeens was the man, isn't that correct, at that time?

A. At that time I might not have been sure." (Tr. 253)

* * *

"Q. It is not correct that you were positive? This has helped refresh your memory, hasn't it?

A. Right.

Q. Okay. After you weren't sure, the police, about five minutes later located another picture of the defendant, is that right?

A. Well I guess so.

"Q. And they had another picture and they put it in the slide viewer for you to see, is that right?

A. Right.

* * *

"Q. So it is correct to say they found a picture of Mr. Skeens about five minutes later and took that picture and put it in the viewer and showed it to you, is that right?

A. Right." (Tr. 254)

Mr. Swindler was then positive of this second picture. (Tr. 255)

"Q. Before I ask you any further questions, do you remember the officer saying, about the man that was on the screen saying to you, 'He ain't too long been out, he's been released. He didn't say when but he said he's out on the street.' Do you remember the officer telling that to you?

A. No." (Tr. 255)

Reading the preliminary hearing transcript did not refresh Mr. Swindler's recollection.

"(The tape recorder is played as follows:)

Answer: I said he looked much better. One picture was clearer than the other picture.

Question: What was said to you by any of the officers present after that?

Answer: What was said to me? You say, What was said to me?

Question: That's right.

Answer: He says, 'He ain't too long been out, he's been released.' He didn't say when but he said, 'He's out on the street.'" [End of recording] (Tr. 257)

FURTHER CROSS-EXAMINATION

"Q. After you had told—weren't you asked this question before the Commissioner: 'After you were told that it hadn't been too long since he had been out, did he ask you if you were positive? Answer: Yes. Question: And that's when you stated you were positive, is that correct? Answer: I says, If I see them both together I could identify them much plainer but he do look like the shortest man that held me up.' Did you not say that to the policeman?

A. Right.

"Q. What you were saying is you wanted to see both men together in person, isn't that right?

A. Right.

"Q. And the reason you wanted to see them together in person is because you could be surer in your mind when you saw someone in the flesh—right?

A. Right." (Tr. 260)

Mr. Swindler additionally testified that the defendant was never placed in a lineup for him to pick out. However, the day after the robbery and arrest of Skeens and one Francis Reichert, Sergeant Blancato picked Swindler up at work and took him to the U.S. Commissioner's office. Mr. Swindler sat there for about one hour when Blancato retrieved him and told him to come along. Blancato then had Mr. Swindler stand in the doorway opposite the U.S. Commissioner's cellblock.

"Q. And as you were standing in that doorway, across from you, two suspects, just two, were brought out that you saw; isn't that right, two suspects in custody?

A. Right.

"Q. Two white males—right?

A. Right.

"Q. And you saw them and you said to Officer Blancato 'Those are the two guys that held me up,' right?

A. Right." (Tr. 264)

The witness also stated that prior to being picked up by the police that morning, Mrs. Bugg had informed him that the police had called and indicated that they thought they had the two men who had robbed him. (Tr. 265-266)

The entire government redirect examination of Mr. Swindler consisted of the following:

"Q. Are you sure that is the man who robbed you?

A. Right.

[Prosecutor]: No further questions." (Tr. 271)

After this testimony, and contrary to his opening statement, the prosecutor rested his case. (Tr. 275) When reminded of his opening statement, counsel called his decision to rest, a tactical matter.

"[Defense Counsel] Your Honor, in light of this 'tactical' decision of the government, we would ask that the officers—I be allowed to call them and examine them as any adverse witness. . . ." (Tr. 276)

Before allowing defense counsel to call the officers as hostile witnesses however, the Court required a proffer to demonstrate hostility. Defense counsel indicated that the arresting officers were highly motivated against James T. Skeens, because the latter in the role of informant had helped convict Sergeant Blancato's friend and former policeman Thomas Donohue, on whose behalf Blancato had

testified. Skeens' cooperation with the government had also helped to convict—it was further point out—Lawrence Wallace, Lieutenant Wallace's brother.

> "The government monitored and recorded certain face-to-face and telephone conversations between appellants Wallace and Donohue and their acquaintance James Skeens, a sometime gambler who was a party to the government surveillance." *Wallace v. United States,* 134 U.S. App. D.C. 50, 52, 412 F.2d 1097 (1968) (Affirming their convictions.)

"The Court: Who were the officers that went to the house of Officer [*sic*] Skeens?

[Defense Counsel]: Officer Blancato and Lieutenant Wallace . . .

Captain Wert of the Internal Investigation Unit has investigated this case from the defense point of view because of what the police department considers the gross improprieties of these two officers. Captain Wert informed me that Lieutenant Wallace, who he thought was the acting head of the Robbery Squad on the day of the arrest was working day work, and there was no reason for him to be there at the time of the arrest, especially knowing that his brother was convicted by this man. Secondly, at the time of the arrest at Skeens' house, there was taken out of his house numerous documents relating [to the] Barnes investigation. I will read off to your Honor what they are." (Tr. 279)

* * * * *

"We marked as Defendant's Exhibit 5 yesterday, a picture of a man named Red Pope. You will remember when I asked Swindler, 'Is this the defendant,' he took a very long time before he said, 'No.' I am sure that everyone in the courtroom recalls that.

"At the time he was arrested by Officer Blancato–that is to say Red Pope–the date is 5/28/67–Pope was wearing a brown tweedish type sport jacket.

"In addition, Officer Blancato told Mr. Sherbacow, prior counsel, that he found out the source of the shotgun. That is Officer Blancato told Mr. Sherbacow. And, the source of the shotgun in the Swindler hold-up was Red Pope, according to Officer Blancato.

"Now, he also informed Mr. Sherbacow that he had recovered shotgun shells, and he even showed Mr. Sherbacow the type of shotgun involved–it was one that hung from the belt with a loop, a swing-type shotgun.

"At this time under Brady v. Maryland, I want to put Blancato on the stand to inquire about that. He has fantastic evidence favorable to the defendant.

"I want a voir dire examination of Officer Blancato concerning Red Pope, a known, and I believe convicted robber. (Tr. 280-281)

Detective Sergeant Blancato then testified pursuant to this defense request out of the presence of the jury. He stated that Red Pope was in fact Claude K. Pope, a convicted robber, who was about the same age as the defendant. Detective Blancato stated that he arrested Pope in May of 1967, "he was a parole violater when we arrested him." (Tr. 285) When asked whether he had told Mr. Sherbacow in June of 1967, on the third floor of this court house that the source of the shotgun in the Skeens case was Red Pope, he replied "No, sir. I didn't say that." (Tr. 286)

"I told Mr. Sherbacow that we got information that the defendant Skeens and another man by the name of John Scott had hired Red Pope to kill the victim, and that the shotgun used in the holdup was stolen from a house in Prince George's County, and we knew

where the shotgun came from. I never said that Red Pope told me where the shotgun was.

"Q. You never said you found the source of the shotgun and had ammunition?

"A. Yes, we had ammunition. We had ammunition and we knew where the source of the shotgun came from, yes sir.

"Q. Who was the source of the shotgun?

"A. I am not going to tell you. He is a very reliable informer.

"Q. In other words, you know the source of the shotgun in the Duke Zeibert holdup, but you are not going to tell us?

"A. No, sir.

"Q. Do you have the shells now?

"A. Yes, sir.

"Q. Swing type shotgun?

"A. I don't know what kind, but there are ammunition.

"Q. Where was it recovered, officer?

"A. The shells?

"Q. The gun?

"A. We don't have the gun.

"Q. I thought you just indicated—

"A. You didn't ask me that, Mr. Palmer. You asked me if we had the ammunition, and I said, yes we had the ammunition.

"Q. Was that recovered from Red Pope?

"A. It was recovered from a home or house where Red Pope had frequented just before we arrested Red Pope. That was from a home of a man by the name of John Trevvett.

"Q. But he is not the source of the shotgun, I take it?

"A. No, sir.

"Q. Is there any question in your mind that the source of the shotgun in the Duke Zeibert holdup as you know it, is correct?

"A. Yes, I would say the information is correct. We never found the shotgun, no, sir. . . .

"Q. . . . Who were they supposed to kill?

"A. The victim Nathaniel Swindler.

"Q. The victim. Who told you that?

"A. The informer.

"Q. . . . Without getting to the killing—just the source of the shotgun as being from Red Pope.

"A. Mr. Palmer, Red Pope, as far as I know, never had access to that shotgun. I think I know what you mean. The victim was shown photographs of Red Pope. I know that Mr. Sherbacow insisted that it was not Skeens—that it was Pope. But, we investigated all of this, and Red Pope was not involved in the holdup of Duke Zeibert." (Tr. 286-289)

Upon the conclusion of Detective Blancato's testimony defense counsel moved for production of the informant. After further colloquy including a proffer of what the alibi defense would be so that the Court's factual picture would be complete re the necessity for informer production (Tr. 289-301), Sergeant Blancato resumed the stand out of the jury's presence for further testimony about his informer.

"Q. The informant that you didn't want to disclose to us, without telling us who he is, what is his relationship to the shotgun?

"A. I am not going to tell you that either. He told us where the shotgun came from. You mean, does he own it or anything like this. No, this is not what I said.

"Q. We are trying to clear it up. That is all. This informant knew who owned the shotgun I take it?

"A. Yes, sir.

"Q. And, that was not Mr. Skeens or Mr. Reichert?

"A. No, sir.

"Q. This informant spoke to the owner of the shotgun?

"A. I don't know this. I never asked him.

"Q. But, this informant that you know does know the owner of the Duke Zeibert shotgun?

"A. I don't know this either. I am telling you that he told me where the shotgun came from. . . .

"The Court: When you say the shotgun, Officer Blancato, was it identified by your informant as the gun that was used in this case?

"The Witness: Yes, ma'am. . . .

"[Detective Blancato] The informant told us at the same time when we found out about the shotgun, that they had hired a man by the name of Red Pope to kill the victim, and that Red Pope was a parolee, and that the gun was then at an address on 13th Street. We went to the address on 13th Street, and turned up at the house of another thief, by the name of Travvett and talked to his girlfriend. We recovered ammunition, a shotgun shell, some parole papers belonging to Red Pope, pinch bar, and we went looking for Pope. We found Pope in the Alamo Restaurant on 14th Street.

"We arrested him and brought him to headquarters, because we knew he was wanted for violation of parole. We had checked this. He was turned over to the Marshal's office. He was never charged with conspiracy to kill the victim in this case. We got another call from the informer.

"The Court: Why not?

"The Witness: Well, we had nothing to back up what was told by the informant—just the informant's word, who I would not bring into Court...." (Tr. 306-308)

* * * * *

[By Defense Counsel]

"Q. ...Now, getting back to your informer. He is pretty reliable?

"A. Oh, very reliable.

"Q. Credible?

"A. Very much so.

"Q. All right.

"A. He told me things as recently as three weeks ago.

"Q. Good. This credible informant, when he indicated that the shotgun was stolen from another thief's house, which thief was it stolen from?

"A. I never asked him and he never told me...

"Q. Did he tell you who stole it from the thief's house? That he told you?

"A. No, Sir.

"Q. You didn't ask that?

"A. No, sir. I wasn't interested in who stole something in Maryland.

"Q. You weren't interested in who had possession of the shotgun?

"A. I was told who had possession of the shotgun.

"The Court: That was Mr. Pope?

"The Witness: No, that was Mr. Reichert. This house where we recovered this stuff was also. While Travvett was in jail, this woman was living with Reichert at this house. . . ."

[By Defense Counsel]

"Q. Do you have any notes about that?

"A. There is some of it in there. . . .

"Q. What do you have written down there, Officer?

"A. 10:30 p.m. on May 27th to 1030 13th Street, Northwest, Apartment 218, looking for Red, meaning Pope, interviewed Kay Travvette McCurrie, white female, 31 of above, phone 347-6977. She has seen Pope with sawed-off shotgun in February, 1967, and also seen Reichert with Pope about the same time she saw the shotgun. Also she said that Travvett had a luger type weapon when he stayed with her in November, '66. Received a box of Luger ammo, 12 gage shotgun shell, paper for Pope, cutting shears. . . . May 29, 1967, 8:55, informer called again and stated they hired another guy by the name of Lewis to kill the complainant, and was supposed to do the job either Wednesday or Thursday of this week, and the informer will keep us posted. . . ." (Tr. 310-313)

[By Government Counsel]

"Q. Did the informant say who had possession of the shotgun at the time of the crime?

"A. He told– . . . This when he told me about Reichert's girlfriend . . . he said her name was Kay. He told us the address and the apartment number. . . .

* * * * *

"Q. Did the informant ever tie Reichert up with this?

"A. Yes, he told me that Reichert was the one that carried the shotgun, and that the shotgun was then at Reichert's girlfriend's house, where it had gone after the holdup.

"Q. He told you that Reichert carried the shotgun at the time of the Duke Zeibert robbery, is that right?

"A. Yes, sir." (Tr. 316-317)

After further colloquy Judge Green stated:

"The Court feels that Mr. Palmer has a right to cross examine this informant and to find out whether, in fact, Mr. Reichert was the one with it or whether it was Red Pope who was with it, and something thoroughly unrelated.

"And, the Court first of all feels that certainly a subpoena should be issued, I would think, to bring in this woman who has been mentioned in this case. . . Insofar as the informant is concerned, the Court will not have him produced in open Court, but will do all possible to keep his identity.

"[Defense Counsel]: Your Honor, the best way to do it as I see it, is have him come into your chambers. I, as an attorney, and member of the Bar, will not reveal this man's name. It will remain in my confidence. It will not be revealed to anybody. I so advise the Court." (Tr. 321)

After the noon recess a further conference was held in Judge Green's chambers. At that time Judge Green indicated that she was willing to meet with the informant at a site away from the court house for the latter's protection. (Chambers Tr. 1, February, 1969 hereinafter Ch. Tr.)

Government counsel indicated at that time that he had not asked Detective Blancato who the informant was nor did he know his name. Sergeant Blancato stated that he had spoken with the informant about 30 minutes earlier at which time he was given the additional information that the shotgun had been stolen by Reichert from John Scott's Coffee Shoppe and that the gun had originally been stolen from a home in the Cheverly area of Maryland in the summer of 1966. He further stated that the informant was frightened, would not come in, and will not talk to anyone. It was indicated that Sergeant Blancato feared for the man's life. According to Blancato, his first contact with the informant about the instant case came approximately three weeks after Skeens' arrest for the robbery. (This three week figure is patently inaccurate as defense counsel at the time pointed to a handwritten note of Blancato's dated May 27, 1967, concerning a conversation with the informant about this case. (Ch. Tr. 4)

> "The Court: The Court has further observed that not seeing eye to eye with [the prosecutor] that this is—we certainly agree—this testimony is not necessary for the arrest and that I do not think figures in there at all insofar as the case is concerned. I don't believe it is the defense's contention.
>
> "[Defense counsel] Oh, no.
>
> "The Court: But to decide this is not important to their defense—and I am well aware of the difficulties involved in revealing an informer, and I realize the seriousness of it. On the other hand under the cases we must consider whether or not he would be helpful to the defense in the defense of their case . . . it would seem certainly imprudent to tie the defense's hands in such a way he is not to make this available to them in this matter of who had the gun and where was Pope brought into this. . . . It seems a bit impossible for this Court to say that the defense may not have

> access to this informer to find out just exactly where and what the position of Pope was in this matter and Reichert because it still has not tied in with this defendant Skeens and Reichert is out of this case having been dismissed as part of the identification hearing before Judge Bryant. And so the Court reluctantly rules if he isn't made available I feel I would have to dismiss the case." (Ch. Tr. 7-9)

The subsequent procedural maneuvers by the government in this Court are outlined in appellant's brief at pages 5-8.

DEFENSE CASE

The first witness called by the defense was Detective Sergeant Louis Blancato. Before his testimony is outlined, we would like to point out that in Judge Green's order of August 7, 1969, dismissing the indictment—from which the instant appeal was taken—she took the unusual step of alluding to "prejudicial testimony having been injected into the case by Detective Sergeant Blancato." His testimony before the jury was taken February 20, 1969. When the trial began on February 17, 1969, defense counsel stated to the Court:

> "I would like to indicate for the record also that when Officer Blancato testifies to have him admonished just to answer my questions, so he doesn't give non-responsive answers, and especially if he talks about Skeens not to put in any hearsay about knowing him as a holdup man or something like that.
>
> "[Prosecutor] Your Honor, I will take it upon myself to speak to Officer Blancato." (Tr. 5)

Furthermore since knowledge of the informer and his alleged statements were only available to us through Sergeant Blancato, we believe *his* truthfulness as a witness as it appeared to the Court, in addition to any indication of bias, are very important factors in

presently assaying whether or not Judge Green acted correctly in ordering production of Sergeant Blancato's informant.

1. Sergeant Blancato testified that on the morning of the robbery Mrs. Bugg called him to say "as near as she could figure at that time the cash was less than $5,000." (Tr. 376)

1a. Mrs. Bugg, as indicated earlier, testified that the cash figure never dropped below $5,997.48. (Tr. 137)

2. Defense counsel asked the detective for any notes he had made reflecting a figure of less than $5,000. In response he produced a document we marked as Defendant's Exhibit No. 6. "You can probably see where I crossed off the amount of cash she first gave us. I didn't say forty-nine, I said less than five. . . ." "You erased it so completely it is no longer legible, is that correct? A. . . I just crossed it off. . . ." (Tr. 377-378)

2a. After defense counsel stated: 'At this time I want to submit that to the F.B.I. laboratory for analysis to determine what figure was under those scratches, if they can. (Tr. 379) The prosecutor handed counsel a clean copy of Exhibit 6, which revealed the obliterated figure as "15,211.72" in cash and checks. (Tr. 381)

> "Q. I repeat the question: is there anywhere in your file a statement from Mrs. Bugg that the amount taken was less than $5,000.00?
>
> "A. I guess not, no, sir." (Tr. 382)

The uninitiated may wonder what possible relevance this dollar amount had to do with the issues at trial. Its relevance appeared in further questioning of Sergeant Blancato which indicated that F.B.I. Agent Phillip Harker [incorrect in transcript as Harper] appeared at police headquarters while Mr. Swindler was looking at the color slides, and that Blancato knew the F.B.I. did not concern itself with robberies under their jurisdictional amount of $5,000. (Tr. 383)

Blancato told Agent Harker that the amount of cash involved was under $5,000 and the latter "picked up his bags and left." (Tr. 385)

An independent witness to the photographic identification process had thus been eliminated.

3. Compare Mr. Swindler's trial testimony and the U.S. Commissioner's tape recording of him, with the police affidavit for Skeens' arrest, which is contained in the record on appeal.

The affidavit stated *inter alia:*

> "At 11:45 a.m., May 15, 1967, the complainant was shown three reels of color slide photographs (80 photographs per reel). Upon getting to the color photograph of James T. Skeens, he positively identified the photograph of Skeens as the No. 1 subject, who is the shorter of the two men. He was shown several more reels of film and upon coming to a later photograph of Skeens taken in May, 1966, the complainant jumped up from the chair and stated 'that's him.'"

4. On May 16, 1967, Mr. Swindler was seated in an anteroom *adjoining* the U.S. Commissioner's hearing room because—according to Blancato—the latter room was so packed you "couldn't hardly get in the door." (Tr. 393)

4a. Paul Sherbacow, former defense counsel for Skeens and at the time of trial an Assistant United States Attorney for the District of Connecticut, testified that he represented Mr. Skeens on the morning of May 16, 1967, before the Commissioner. (Tr. 408, 409, 413)

> "Q. Now, did you have any trouble getting into the hearing room itself?
>
> "A. I don't understand.

"Q. Did you have any trouble pushing your way through any crowds into the hearing room?

"A. No.

"Q. Any seats in the hearing room when you went in?

"A. Yes.

"Q. Was it jammed packed so no one could take a seat out there?

"A. There weren't many people there at all. This is the 16th you are talking about?

"Q. Right.

"A. No, there were not. . . ." (Tr. 416-417)

5. Because of this allegedly packed hearing room, Sergeant Blancato took Mr. Swindler through the U.S. Commissioner's private office which conveniently exits into the hearing room, opposite the cellblock from which the prisoners emerge. As the officer and Mr. Swindler were going through the doorway into the hearing room, Skeens and Reichert in the custody of a U.S. Marshal *chanced* to simultaneously enter the room from the cellblock. (Tr. 392-395)

"[Swindler] wasn't standing there, we weren't going to stand there. . . . He was walking through the room when the other door opened. . . ." (Tr. 394)

5a. Compare Mr. Swindler's earlier described testimony:

"Q. . . . Officer Blancato had you stand in the doorway, isn't that right? Do you remember he took you to a doorway?

"A. Right.

"Q. And as you were standing at that doorway, across from you, two suspects, just two, were brought out that you saw. . .?

"A. Right." (Tr. 264)

At that time he identified these two to Blancato as the holdup men.

6. When Blancato was questioned before the jury about Red Pope the following occurred:

> "Q. All right. You arrested Red Pope you told us on the 27th?
>
> "A. Yes, sir.
>
> "Q. For what?
>
> "A. Because he had a contract to kill a victim." (Tr. 406)

6a. When questioned earlier out of the jury's presence he had indicated re Pope's arrest:

> "We arrested him and brought him to headquarters because we knew he was wanted for violation of parole. We had checked this. He was turned over to the Marshal's office. He was never charged with conspiracy to kill the victim in this case. . . ." (Tr. 308)

Because of this purposeful introjection of a "contract to kill a victim" testimony, the government itself suggested a mistrial. (Tr. 407) The defense, however, did not move for one on tactical grounds (Tr. 407), but did remind the Court of previously having had the prosecutor caution the witness about his answers before any testimony had ever been taken.

> "I told you that man is a dangerous brutal witness" (Tr. 407)

Perhaps at this point in the trial the Court was fully convinced of something stated by defense counsel when the informer production issue was debated at the earlier meeting in chambers.

> ". . . other police officers told me when I indicated that Sergeant Blancato would come with the informer

that they didn't think that there was, that he had a man who gave that information. That was Captain Werk and Sergeant Merandes (phonetically spelled), who investigated the Barnes case over about a year and a half ago or two years.

"There statement to me was that if that witness chair was a lie detector test Blancato's ears would light up. These are policemen." (Ch. Tr. 4)

More on Sergeant Blancato

7. "Q. At 10:06 in the morning of June 6 or 7, on the third floor of this court house—answer the question as I ask it—did you not tell Mr. Paul Sherbacow that the source of the shotgun was Red Pope, yes or no?

"A. No." (Tr. 405)

7a. Testimony of then Assistant U.S. Attorney Paul Sherbacow.

"Q. On the 6th or 7th of June at about 10:06 in the morning on the third floor of this building did you see Officer Blancato?

"A. Yes, I did.

"Q. Did you have any discussion about the shotgun used in the Duke Zeibert hold-up?

"A. Yes.

"Q. Did he indicate he knew the source of the shotgun?

"A. Yes, he did.

"Q. Did he tell you who the source was?

"A. Yes.

"Q. Who?

"A. A man by the name of either Red, or Reds Pope." (Tr. 426)

Sergeant Blancato

8. "Q. This sawed-off shotgun was supposed to be a swing-type.

"A. I don't know.

"Q. You did not also tell Mr. Sherbacow at that time it was a sawed-off 12 gauge shotgun that hooks onto here so it swings and when it drops the man covers it up with his coat?

"A. How could I tell him that? I don't even know what kind of shotgun it was." (Tr. 405-406)

8a. Mr. Sherbacow

"Q. Did [Blancato] describe the shotgun to you?

"A. Yes, he did. His description of it was a swing-type shotgun and I didn't know what it meant. First time I ever heard the term and I asked him to explain it to me and he explained it to me. He gave me the length of it, said 12 inch sawed-off shotgun and swing-type and I asked what swing-type meant and he described it as something to be attached to the belt and used with one hand and dropped. It wouldn't drop to the ground, it was attached to the belt somehow and hung under the coat?" (Tr. 426-427)

Odds and Ends on Sergeant Blancato

9. Although Swindler testified that he let a picture of Skeens go by the first time it appeared only to appear a second time (Tr. 236), Blancato stated "no chance of that". (Tr. 435-i)

"No, sir. He couldn't have seen a picture of Mr. Skeens go by. That was the only picture at that time in the file.

"Q. That testimony would surprise you, wouldn't it?

"A. Yes, sir, it certainly would." (Tr. 435-j)

10. As to the second picture shown to Mr. Swindler.

"Q. So you disagree with Mr. Swindler's testimony that you took that picture, threw it in and put it on the wall, that is incorrect?

"A. Yes sir. . . ." (Tr. 435-m)

11. When this case was first called for trial, defense counsel asked to have excluded a post arrest statement made by Skeens in his home to the effect "that he was alone." (Tr. 5-6) As will be recalled, one Francis Reichert was arrested therein a short time later. The Court ruled Skeens' statement inadmissable (Tr. 7, 15)

11a. Government Examination of Sergeant Blancato.

"A. And then I walked in and I read him his right, told him, advised him of his rights, also and he was asked if he was alone in the house and he said—

"Q. Now just a minute. Then shortly thereafter he was searched is that right?

"A. Yes, sir. (Tr. 517)

* * * * *

"Q. . . . Now what did you do yourself after he was searched?

"A. . . . he was told to sit on the sofa and we started asking him if—who will take care of the kids and *he said he was alone* and that he. . . ."

"[Defense Counsel] . . . May we approach the Bench? (Tr. 517-518)

"[At the Bench]

"[Prosecutor] . . . As your Honor saw, I just cut him off a few minutes ago. . . . I told him that it had been excluded." (Tr. 518)

Alibi Defense

Parole Officer Howard C. Wood testified that in May of 1967, Mr. Skeens was in his charge as a parolee for lottery law violations. On the day of the robbery the defendant had made a routine visit to Mr. Woods office at 300 Indiana Avenue, N.W. upon the latter's request. He placed the time he saw Mr. Skeens in his office at 11 a.m.

"Q. Did Mr. Skeens indicate where he was going after seeing you?

"A. I believe he said something about going to see his lawyer. (Tr. 554)

* * * * *

"Q. . . . Where was his wife at this time?

"A. From recollection I—

"Q. As best you can recall.

"A. I believe that he said she may have been waiting downstairs in an automobile.

"Q. She was supposed to be with him at the time?

"A. Yes." (Tr. 554-555)

Attorney Meyer Koonin testified that on May 15, 1967, he had occasion to be in this court house before Judge Matthews.

"I was in her courtroom from ten o'clock in the morning until about 10:30 in the morning. . . .

"Q. What time did you get to the main floor, would you say?

"A. I think I stopped somewhere in the corridor and chatted with somebody and again I would say about 10:35 or 10:40 [Just about the time the robbery was being commited.]

"Q. About the time you hit the corridor did you see any woman that you knew?

"A. As I reached the main corridor, yes, I did. . . .

"Q. Who did you see?

"A. I saw Mrs. Marsha Skeens. . . .

"Q. Did you know Marsha Skeens before May 15 of 1967?

"A. I did.

"Q. Pretty well?

"A. Very well."

CROSS-EXAMINATION

"Q. . . .How do you place this 10:35 or 10:40 time? Is it an approximation of the time it took you in front of Judge Matthews?

"A. No. It is a recollection of having looked at the clock in the courtroom as I departed the courtroom." (Tr. 441)

Mrs. Skeens was unavailable to the defense to tie the time sequence with the parole officer together, because she had been killed prior to the trial.

Paul Sherbacow testified that on May 15, 1967, Mr. and Mrs. Skeens were in his office at 601 Indiana Avenue, N.W. from between 11:10 or 11:20 a.m. until 12:00 noon. Mr. Skeens was dressed in a "blue suit, white shirt, blue and gray striped tie, black shoes." (Tr. 412)

"Q. Mr. Skeens' black shoes . . . did they have thick crepe soles on?

"A. No, they did not.

"Q. What style were they?

"A. They were pointed toes—I describe them as Italian shiny, black leather shoes.

"Q. Had you ever seen the shoes before?

"A. Yes, I had.

"Q. Any reason you remember them?

"A. I remember them because they were identical to a pair I had to buy for my wedding and I hadn't worn them since." (Tr. 412-413)

Sergeant Blancato also testified that $2,676 in cash was seized from Skeens' house on the evening of May 15th. (Tr. 448) We also established through him that a large amount of numbers slips on flash paper was seized at the same time. (Tr. 468-469) We further showed that Skeens was charged by information in Prince George's County Maryland with running a lottery and possession of numbers slips growing out of this May 15, 1967, seizure from his home. (Tr. 472-473)

Cross-Examination of Sergeant Blancato
Re the Search of Skeens' Home

"Q. Did you find a sawed-off shotgun?

"A. No, sir.

"Q. Pistol?

"A. No, sir.

"Q. Blue canvas airline bad? . . .

"A. No, sir.

"Q. Did you find any checks from Duke Zeibert's?

"A. No, sir." (Tr. 460)

The Court refused a defense request to call a Metropolitan Police Department polygraph operator who had administered a so-called lie detector test to Mr. Skeens on July 3, 1967, concerning the robbery, which in the opinion of the operator, Sergeant Preston, was not committed by the defendant. (Tr. 563-565).

ARGUMENT

In *Roviaro, supra,* it was stated:

> "Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged the possible defenses, the possible significance of the informer's testimony, and other relevant factors." 353 U.S. at 62.

At slip opinion 9, the majority herein observes:

> "In striking this balance as we do today, we find ourselves in accord with every other federal appellate court, including a panel of this Court in *Anderson v. United States,* 106 U.S. App. D.C. 340, 273 F.2d 75, *cert. denied,* 361 U.S. 844 (1959), which has had occasion to consider the disclosure problem since *Roviaro.* The lower federal courts have consistently held that *Roviaro* does not require disclosure of an informant who was not an actual participant in or a witness to the offense charged." (Citations omitted)

This newly adopted rigid test for production based upon whether or not the informer was an "actual participant in or a witness to the offense charged," appears, however, to ignore the specific injunction of *Roviaro* "that no fixed rule with respect to disclosure is justifiable." 353 U.S. at 62.

Furthermore, this test is apparently to be utilized in conjunction with an earlier announced rule to the effect that "a heavy burden . . . rests on an accused to establish that the identity of an informant is necessary to his defense." At slip opinion 8. We know of no such "heavy burden" to be found within the *Roviaro* opinion. When these two requirements are thus combined, trial judges in the future will no longer feel required to carefully weigh the disclosure

balance, rather, the newly announced "Skeens Rule" will provide an easy formula leading to the denial of all contested requests for informer production.

Were this a so-called "locked" case over which reasonable men could not differ as to appellee's guilt because of the strength of the prosecution evidence, we would be the first to agree that our quest for informer production might very well be properly rejected by the Court. We adhere with all candor, however, to our original description of the government's case as one that "can generously be described as 'paper thin.'" Brief for appellee at page 33. It is in this context important to bear in mind what *Roviaro* was all about, *i.e.*, a judgment aimed dead center at assuring trial fairness where a defendant's guilt or innocence lay in the balance. We are not seeking a technical or academic production, but rather *help* from whatever source available to aid our defense. While the informer issue was not reached on procedural grounds in the earlier mandamus proceeding herein, *United States v. Green*, 134 U.S. App. D.C. 278, 414 F.2d 1174 (1969), we are reminded of a comment by Judge Leventhal during the oral argument thereof to the effect that a requirement for informer production might very well vary inversely to the strength of the government's case. Patently, this is one of the "particular circimstances" the Supreme Court had in mind in *Roviaro*. In addition, the credibility of Sergeant Blancato cannot be separated from a consideration of the correctness of the ruling below. At best Judge Green found his conduct offensive to a fair trial as reflected in her order dismissing the indictment. And while the jury may have swallowed his testimony as gospel, the trial court was itself obligated to weigh his credibility separately from the jury on the informer issue, which she alone was to determine. It cannot be gainsaid that the record abounds with clear cut examples of Blancato's severe impeachment. Judge Green obviously considered this along with the man's natural animus toward Skeens resulting from the latter's help-

ing to convict Blancato's friend, a former policeman. Since our only nexus with the informant was Blancato, his conduct during the trial proceedings was clearly one of the "other relevant factors" which the district court could have and did take into account before ruling. In the context of this case, would it not have been unfair to leave the *extent* of the informant's knowledge solely within the control of this police officer and whatever filtering processes he might apply to the flow of information helpful to Mr. Skeens.

On this complicated factual record the majority opinion merely observes:

> "The government presented two witnesses. The first was the victim of the robbery, Nathaniel Swindler, who testified that at about 10:30 a.m. on May 15, 1967, he was robbed by two men in an alley behind Duke Zeibert's Restaurant. Swindler made an in-court identification of appellee as one of the two robbers, and stated that appellee was carrying a pistol and the other man was carrying a sawed-off shotgun. The Government's second witness was the office manager at the restaurant, who confirmed that Swindler had about $14,000 in cash and checks to be delivered to the bank at the time he was robbed." At slip opinion 2.

Nowhere does the majority opinion appear to weigh the infirmities in the prosecution's case as an important part of the balancing process to be undertaken. Some slight mention is made, however, of these factors as something which we have apparently merely alleged without, insofar as the opinion is couched, ever having really shown to anyone's satisfaction.

> "He contends that because of the existence of an alibi defense, because of what he characterizes as a 'paper-thin' government case based upon a 'poor' identification, and because of the alleged bias of the

> investigating officers, he should have been permitted to question the informant in 'order to get to the core of the matter'". At slip opinion 8.

This "broad brush" treatment of the record buries, we submit, the normal appellate rule that requires the record to be read in the light most favorable to appellee. The instant case is no different from any other appellate proceeding and we were accordingly entitled to have the evidence viewed from this favorable angle of vision.

Getting to the "core of this matter," when the evidence is thus viewed, how unreasonable was it to assert in the light of human experience that only an insider would be privy to the machinations disclosed which could lead to a lifetime in jail, and then some. Is it likely that participants in an armed robbery and conspiracy to murder a government witness would *constantly* broadcast their plans to friend and foe alike? Is it not probable that this informer who, *inter alia*, told us through Blancato that Francis Reichert held the shotgun during the robbery—knowledge not alleged to be arrived at via hearsay—was "an actual participant in or a witness to" the robbery. But this alone is not what *Roviaro* is about. Is it not also probable that this informant could have been helpful to the defense by providing leads to other exculpatory evidence? For example, it was this shadowy figure who led to Kay McCurrie, a potentially useable defense witness who could place Reichert and Red Pope together as late as February 1967, and could put a sawed-off shotgun in Pope's hands at about the same time. Furthermore, the informant—as best we can glean from the record—never told Sergeant Blancato that appellee was actually involved in the Duke Zeibert robbery.

On these facts, however, our assertions have been labeled mere "speculation" insufficient to shoulder the "heavy burden" that now confronts us; and, quoting from *Miller v. United States*, 273 F.2d

279, 281 (5th Cir. 1959), as but the product of "a fertile imagination of counsel." At slip opinion 9.

Concededly, there was no direct testimony from Sergeant Blancato that the informant was present at or participated in the robbery, or could give us further help with our defense. Aside from the difficulty of having to wrest this information from an officer highly motivated to see Skeens convicted, we, as lawyers, are very often confronted with a lack of direct evidence on a point and yet reach conclusions via the circumstantial evidence route. Many persons have been convicted of many crimes in this jurisdiction including first degree murder upon the basis of "circumstances." And yet because our burden is now a "heavy" one—whatever this may mean—we are denied the natural and logical thrust of the facts of record we relied upon to gain our relief. The cogency of Chief Judge Bazelon's dissent herein is thus made abundantly apparent wherein he observes that the rule announced by the majority opinion, "emasculates the Supreme Court's holding that '[w]here the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way . . .'." At slip oipnion 12-13.

Under the test announced by the majority we could never reach the informant unless Sergeant Blancato opened the door for Mr. Skeens by providing us with sufficient additional facts to help us shoulder our "heavy burden"; a not too likely event—at least not on this record.

We submit that the rule recently announced by two cases from the Supreme Court of California correctly state the test to be applied under *Roviaro* and its adoption by this Court can only result in affirmance of the judgment below.

> "By the very nature of the problem here confronting defendants it is impossible for them to state *facts*

which would show the materiality of the informant's testimony. Since they do not know his identity they cannot possibly state factually what he will say if he is required to testify. All that defendants are required to do is to demonstrate 'a reasonable possibility that the anonymous informant . . . could give evidence on the issue of guilt which might result in their exoneration'." *Price v. Superior Court of San Diego County*, 463 P.2d 721, 83 Cal Rptr. 369 (S.C. Cal. 1970) (En banc)

"The defendant need not prove that the informer would give testimony favorable to the defense in order to compel disclosure of his identity, nor need he prove that the informer was a participant in or even an eyewitness to the crime. The defendant's burden extends only to a showing that in view of the evidence, the informer would be a material witness on the issue of guilt and nondisclosure would deprive the defendant of a fair trial." *Price v. Superior Court of San Diego County, supra.* See especially *Honore v. Superior Court of Alameda County*, 449 P.2d 169, 74 Cal. Rptr. 233 (S.C. Cal. 1969)

CONCLUSION

Wherefore, appellee respectfully requests that the original panel assigned to this case reconsider the majority opinion and affirm the judgment below or that this Court rehear the case *en banc* because of the importance of the issue presented.

Allan M. Palmer
Attorney for Appellee
(Appointed by this Court)

June 1971